

DEFINITION OF WORK MADE FOR HIRE IN THE COPYRIGHT ACT OF 1976

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2044

A BILL TO AMEND THE COPYRIGHT LAW REGARDING WORK FOR HIRE

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DEFINITION OF WORK MADE FOR HIRE IN THE COPYRIGHT ACT OF 1976

FRIDAY, OCTOBER 1, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:45 a.m., in room 2228, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (acting chairman of the committee) presiding.

Staff present: Ralph Oman, staff director; Charles Borden, professional staff member; Linda Colancecco, chief clerk; and Martin Kobren, legal intern.

OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. The committee will come to order.

I apologize for starting late, but I have been talking with the Architect on new construction which we have just unveiled by opening the curtains; and that is a very difficult subject.

Today we are going to hear testimony on Senate bill 2044, which is a bill introduced by the distinguished Senator from Mississippi, Mr. Cochran, which amends the work made for hire provisions of the Copyright Act of 1976. Currently, the Copyright Act includes within the definition of work made for hire certain works which are specially ordered or commissioned. S. 2044 would prevent works commissioned for use in a collection, works commissioned for use in a motion picture or other audiovisual works, and works commissioned for use as educational texts from being considered to be works made for hire.

Under current law, a work made for hire belongs entirely to the buyer of the work and not to the work's creator. Once artists or writers agree to sell their creations as works made for hire, they retain no rights whatsoever in the work; indeed, the law regards the buyer as the true creator of the work.

Recently, freelance artists and writers—those people most affected by the work made for hire provisions of the law—have expressed dissatisfaction with the present situation. They believe that buyers of creative work are using raw marketplace power to force artists and authors to give up their future rights to their creations at bargain prices.

Artists and writers believe that S. 2044 would alter the balance of power between buyer and seller by removing the work of most freelance authors and artists from coverage under the act. Since the works exempted by S. 2044 would no longer be subject to the

work made for hire provisions of the Copyright Act, artists and writers think that buyers would be forced to negotiate for only the rights they need. This, the artists believe, would allow the buyers to obtain freelance work inexpensively while also allowing artists to retain some negotiated control over their creations.

The bill, as it has been introduced by Senator Cochran, deals with both printed and audiovisual material. So, we have followed that division of the bill into what we believe is an appropriate division of testimony today by inviting two panels to discuss the bill, one as it relates to the printed material and one as it relates to the film industry, the audiovisual.

At this point I wish a copy of the text of S. 2044 by placed into the record.

[The Senate bill follows:]

[S. 2044, 97th Cong. 2d sess.]

A BILL To amend the copyright law regarding work for hire

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 101 of title 17, United States Code, is amended in clause (2) of the definition of "work made for hire" by—

- (1) striking out "as a contribution to a collective work, as a part of a motion picture or other audiovisual work,";
- (2) striking out "as an instructional text"; and
- (3) striking out "indexes," through the end of such clause and inserting in lieu thereof "indexes."

Senator MATHIAS. The hearing record will be kept open for 2 weeks for any additional testimony which may be submitted.

We are asking each witness to restrict testimony to 5 minutes. Additional material may be submitted for the record. The first panel will now please come to the table.

The first panel consists of Ms. Robin Brickman, Ms. June Roth, and Mr. Irwin Karp.

We will ask Ms. Robin Brickman, representing the Graphic Artists Guild, to proceed.

STATEMENTS OF A PANEL CONSISTING OF ROBIN BRICKMAN, GRAPHIC ARTISTS GUILD, PROVIDENCE, R.I., ACCOMPANIED BY TAD CRAWFORD, COUNSEL; JUNE ROTH, PRESIDENT, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS; AND IRWIN KARP, AUTHORS LEAGUE OF AMERICA

Ms. BRICKMAN. Mr. Chairman, I am accompanied by Tad Crawford, who is counsel for the Graphic Artists Guild.

Mr. Chairman and distinguished members of the committee, my name is Robin Brickman. I am here as an illustrator and member of the Graphic Artists Guild. I am here to tell you how my career has been hurt by work for hire.

I have been a self-employed freelance illustrator since June 1976. Most of my illustrations are for trade and textbooks, periodicals, and newspapers. The field I work in is extremely competitive, and payment is generally low. It is necessary for me to use all the reuse rights of the art I create in order to stay in business. As a professional, I have had to learn the business side of art, negotiating contracts, budgeting, and career planning. Work for hire prevents me from meeting my goals as an artist and a businessperson.

In 1979, my gross income was \$6,995. Work for hire represented 83 percent of that income. In 1980, my gross income was \$8,455. Work for hire represented 59 percent of that income.

It is clear to me that, if work for hire continues to be the standard contract in my industry, I will never be able to make a comfortable living or advance significantly in my field. In fact, work for hire by its nature denies my skill, my creativity, my professional savvy, and my livelihood. As my career progresses, I am trying to leave work for hire behind me.

I would like to tell you about one job I did under work for hire that continues to haunt me. I was approached by Doubleday Books to do interior illustrations for the *Wildlife Stories* of Faith McNulty. Doubleday contracted with me to do 27 black and white illustrations in a 2-month period for \$2,000. I negotiated for either more money or a limited-use contract. The art director made it clear to me that I either sign work for hire or I do not get the job. Given my income at that time, I knew that the \$2,000 offered would make the difference in keeping me afloat. I was doing more work for hire then. I knew that there were no future reuse payments coming in that would allow me to refuse the job. I had no choice. I had to accept their terms.

I saw the assignment as a chance to do a creative body of art and to work with an author of Faith McNulty's quality. The exposure of this work would be good for my portfolio, but it did not compensate for the loss of control of my art and for future income.

Publishers often trade good exposure for low pay and work for hire contracts. Exposure is great, but it does not pay the bills. I resent being forced to accept work for hire in exchange for projects that will be good for my portfolio.

The Doubleday job was a tremendous amount of work in a short period of time. I got angrier and angrier about the contract terms, the more I got into the work. After the drawings were accepted, my worst fears about the terms of the job were realized. Without my knowledge or consent, which is not necessary with work for hire, Doubleday chose one of the interior drawings as the illustration for the book jacket. Although a book jacket illustration may bring \$500 to \$800, Doubleday had paid only \$75 for that interior illustration. I felt that I had been robbed of extra payment. To make matters worse, they decided to color the illustration in.

I was not at all happy about the way it was colored. I certainly would like to have been involved in any decision to alter my illustration.

After the book was published, two major reviews in the *Washington Post* and *Orion Nature* magazine used reprints of my illustrations extensively as a selling point for the book. The recognition was nice, but I could not think about it much because the low pay, loss of control, and reuse kept nagging me. When I figured out the reuse possibilities on the book cover alone, I realized I had lost what amounts to 1½ year's income.

Doubleday is not alone. Houghton Mifflin is another major client that I cannot afford to work for because of work for hire. When I worked for them, I gave up all future rights, never saw my original pieces again, and was paid some of the lowest rates in the textbook industry: \$50 to \$150, half the current rate.

It is important for you to understand what work for hire means to me. I do not have any of the usual benefits an employee can expect. I have to pay for my studio, utilities, art supplies, and equipment. I do not get group health insurance, paid vacations, sick leave, or unemployment insurance. I feel trapped.

Work for hire is a convenient loophole in a law that was drafted to protect me in my work. The minimal pay I get for work for hire means that I have to take any job that I can get. Every time I do a job under work for hire, I feel like I am working against myself. No matter how high the quality of my work, I will not receive adequate compensation. I cannot claim my own creations. I cannot protect the integrity of my work.

When I think of all my art that is lost to me now, I realize that, in signing work for hire, I signed away part of my future. The theft of my income was sanctioned by the copyright law. Please help us to change this law.

Thank you for allowing me to tell my story. I sincerely hope that this testimony illuminated one more corner of the work for hire trap.

Senator MATHIAS. Thank you very much, Ms. Brickman.

I neglected to point out this little graphic gadget that we have, this video aid that we have, that encourages adherence to the 5-minute law. Let me explain it to the other witnesses. The green light means you are going full speed, but when the red light comes on the gavel falls. I did not drop it on Ms. Brickman because I had not explained that to her. In order to give a fair chance to all the witnesses, I am going to have to adhere to that rule.

Next we will hear from Ms. Roth.

Ms. ROTH. Mr. Chairman and distinguished members of the committee, my name is June Roth. I am the author of 29 books. I have written numerous magazine articles. I am a syndicated newspaper columnist. As president of the American Society of Journalists and Authors, representing 660 leading professional freelancers and as a delegate for the Council of Writers organization, representing 21 writers organizations with over 20,000 members, I appreciate the opportunity to report our members' concern with the work for hire loophole that has emerged in the revised copyright law of 1976.

It was the intent of the revised law to stop publishers from taking ownership of the copyright that should belong to the creating author. The copyright can be considered to represent a bundle of separate rights which can be sold or licensed either separately or all at one time. Customarily, a freelance magazine writer sells the first North American publication rights to a magazine publisher and negotiates whatever additional rights the publisher may wish to purchase for additional remuneration. The author retains the copyright and all other rights such as foreign reprint rights, movie and television rights, audio tape rights, future reprint rights, and possible newspaper syndication or reworking of the material, which could insure financial security for the self-employed creator. Some publishers have seized the wording of part 2 of the work made for hire definition dealing with a work that is specially ordered or commissioned for use as a contribution to collective work as an excuse to write contracts that give themselves the copyright and all the inherent rights therein. The contracts that are offered by

these publishers are considered by our membership to be an act of piracy. These contracts demand that the author warrant that he or she is the sole creator of the work but provide that all rights including the copyright be turned over to the publisher. In such contracts, the publisher claims to be considering the writer an employee while other paragraphs in the same contract declare that the employer is not responsible for customary benefits to employees, such as weekly paychecks, contributions to social security, et cetera.

One magazine worded such a paragraph this way: "In all respects other than under the copyright law, you shall function as an independent freelance contributor, not as an employee of the company," unquote. It goes on to say, "That means the magazine will be the owner of all rights to your material throughout the world in all languages. The magazine and its licensees shall also have the right to use your materials and your name, likeness, biography, and photograph for editorial, advertising, trade and/or promotional purposes," unquote. In this instance, the publisher pockets all future revenues from reprint of the work.

In a recent survey of rates paid to ASJA members, one factor stood out. We cannot survive with one-time payments for well-researched and well-written articles that have future resale potential that is denied by the work for hire coercion. Yet, many writers cannot refuse to sign or not accept work; it is an ultimatum. This puts the self-employed, nonunion, nonorganized writer in an unequal and an unfair bargaining position. A small number of publishers have the entire industry tied up while a large and relatively unorganized population of freelance writers, artists, and photographers need an outlet for their creative efforts. Thus, there is a specialized concentrated industry on one side and on the other a highly competitive and unorganized population of talented people who need the protection of a just law to be able to continue to create and survive financially.

The continuing and increasing specialization of periodicals suggests that writers have a limited number of markets for article ideas. We are also concerned that, as more publishers consider entering the lucrative area of electronic publishing, they may apply economic pressure to acquire the copyrights for their own use without fair compensation to the author. In our view, these publishers' demands that our freelance members perform work for hire as employees in the eyes of the law but without any of the benefits or protections of employees is unconscionable.

We also believe that these practices could ultimately inhibit the free flow of ideas and information, which is so precious to all Americans.

We urge affirmative action on this bill by the committee and by the full Congress. Thank you.

Senator MATHIAS. Thank you very much, Ms. Roth.

Mr. Karp?

Mr. KARP. Mr. Chairman, my name is Irwin Karp. I am attorney for the Authors League of America, the national society of professional authors.

The league appreciates this opportunity to testify in support of Senator Cochran's bill.

I will not read my statement. I submit it for the record and will summarize it.

Senator MATHIAS. The full statement will, of course, appear in the record, without objection.

[Material referred to follows:]

October 1, 1982

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Statement of The Authors League of America

on

S. 2044, To Amend The Definition of
"Works Made For Hire"

The Authors League of America is the national society of professional authors, with a membership of 11,000 authors and playwrights. The Authors League is grateful for this opportunity to testify in support of S. 2044, introduced by Senator Cochran. The Bill would prevent serious abuses of authors' rights that now occur under Clause (2) of the "works-made-for-hire" proviso of Sec. 101 of the Copyright Act.

S. 2044 would delete from Clause (2) three categories of commissioned works which it now permits to be considered as works-made-for-hire" under certain circumstances, thus protecting non-employee authors of such works from compulsion to surrender their valuable right of termination under Sec. 203. The three categories are: (i) articles, stories, poetry, graphic materials and other "contributions" to a magazine, anthology, encyclopedia or other "collective work"; (ii) components of a motion picture or other audio-visual work; and (iii) instructional texts.

The Authors League statement is addressed primarily to the impact of Clause (2) on authors of contributions to periodicals and other collective works, but our comments apply to graphic materials, motion pictures and other audiovisual works, and to educational texts.

Effect of S. 2044

S. 2044 would prevent publishers of collective works from compelling non-employee authors to sign agreements that transform their writings into "works-made-for-hire" and thus deprive the authors of the valuable right to terminate long-term or perpetual transfers of copyrights, 35 years after execution, and recover their rights,

S. 2044 would not, as will be noted, end another serious abuse, the use of publishers' superior bargaining power to compel authors to transfer all rights in their works as a condition to first publication in a magazine, newspaper or other collective work. The Authors League earnestly recommends that the Judiciary Committee also consider this problem and possible amendments of Chapter 2 of the Copyright Act that would prevent publishers from depriving authors of income from subsequent uses of their works.

Initial Ownership of Copyright

Consistent with the Constitutional mandate, the Copyright Act provides that copyright in an article, story, illustration or other work "vests initially in the author or authors of the work." The true author of the work, i.e. the person who created it, is the author for Copyright Act purposes — if the article, story, novel, poem, etc. was not

a "work made for hire". If, however, the contribution, book or other work is a "work made for hire", then the Copyright Act provides that "the employer or other person for whom the work was prepared is considered the author for purposes of this title..." (Sec. 201(b)).

The "work-for-hire" proviso of Sec. 101 defines such a work as

"(1) a work prepared by an employee as a work prepared by an employee within the scope of his or her employment..."

Clause (2) of Sec. 101

Sec. 101 contains a second definition which transcends the limits of the employment relationship and enables publishers to convert works by non-employee authors into "works made for hire" -- to their benefit and the author's considerable detriment. Clause (2) of Sec. 101 provides that a contribution to a periodical or other collective work, an instructional text or a work in other specified categories is a "work made for hire" if:

- (a) it is specially ordered or commissioned; and
- (b) "if the parties (author and publisher) expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Many publishers of magazines and other collective works have, since 1978, compelled countless non-employee authors to sign such agreements, thereby sharply curtailing the rights the Copyright Act was intended to provide to authors -- i.e. those who create literary or artistic works independently and not as an "employee within the scope of his or her employment."

Because of their superior bargaining position, publishers are able to insist that individual free-lance authors sign away their rights in this manner, as a condition for the publisher's agreement to publish the article, story or other contribution ... thereby vesting all rights and the copyright in the publisher as "author", and depriving the true author of the rights and the privilege of terminating the assignment after 35 years.

The Right of Termination

Sec. 203 provides that the author of any work "other than a work made for hire", or the author's surviving spouse, children or grandchildren can terminate any transfer or license of a copyright or right it secures. The termination can take effect after 35 years from the date the transfer was executed. In the case of publishing contracts, it may take effect on the earlier of 40 years from execution or 35 years from publication.

In their Reports on the Copyright Act of 1976, both Judiciary Committees said the provision was "needed because of the unequal bargaining position of authors, resulting, resulting in part from the impossibility of determining

a work's value until it has been exploited." Senate Report No. 94-473, 94th Congress, 1st Session, p. 108; House Report No. 94-1476, 94th Congress, 2d Session, p. 124.

Paradoxically, the very inequality of bargaining power that prompted Congress to establish a termination right is used to deprive non-employee authors of that right under Clause (2) of the work-made-for-hire proviso of Sec. 101. The termination right is particularly necessary for authors of contributions to collective works because "Clause(2) agreements" forced on them by publishers deprive them of their "subsidiary rights" and all future income from these rights.

Usually, the only right under a copyright which the publisher itself exercises is the right to publish the author's article, poem, illustration or other contribution in its periodical -- and that is the only right the publisher actually pays for. But as a condition for agreeing to publish, the publisher insists on a "tie-in" transfer -- the author is required to transfer not only the right of periodical publication (or first publication), but also all of the other rights in the author's work. These "subsidiary rights" include other publications, recording rights, motion picture rights, television rights, and rights to make use of the author's creation by other means. That tie-in transfer is accomplished under a "Clause(2) agreement" because by artificially converting the work into one made for hire, the publisher becomes the "author" and all rights are automatically vested in it.

Thus, the publisher, rather than the author, has the right to license others to use the author's various subsidiary rights, and the publisher will receive all the proceeds. Authors are deprived of the ownership and economic benefit of the rights which the Constitution intended them to enjoy. And they are paid only for the right the publisher actually exercises, the right of publication; no publisher pays a higher price to compensate an author for any share of future income from his/her subsidiary rights lost by the compulsory divestiture of a "Clause (2) agreement".

Publishers do not require the ownership of an author's copyright or exemption from the termination right, in order to protect the publication right they actually pay for and actually exploit. That protection is fully available to them under the Act when the author retains ownership of his/her copyright and subsidiary rights. Nor is it necessary for a publisher to divest the author of his/her copyright, subsidiary rights and right of termination in order to make legitimately related uses of the contribution or other work it has published. This can be accomplished by reasonable contract provisions, without appropriating the author's copyright.

Tie-In Transfers of All Rights

S. 2044 would not prevent publishers from requiring an author to assign his/her copyright and all rights under it as a condition for the publisher's agreement to publish the work in its periodical. A contract for such a transfer is effective so long as it is in writing and signed by the author. The publisher can acquire the rights for 35 years, or for the duration of the copyright if the termination right is not exercised. For the reasons discussed above, the Authors League urges the Committee also consider this problem and possible amendments of Chapter 2, to deal with it.

Mr. KARP. The usual for-hire magazine contract, as the previous witness has said, contains two relevant paragraphs. The first—and I am reading from one an author signed 2 weeks ago—says that, "Our standard agreement with contributors is that all material accepted by the magazine is considered work made for hire. This gives us all rights to your material throughout the world for which you are paid the regular fee. We also want to make it clear that in all respects other than under the new copyright law you function as an independent freelance contributor, not as an employee of the magazine. Unless otherwise stated, you are responsible for all expenses in preparation of your material."

Most of these agreements are drawn basically along the lines of forms contained in a very comprehensive survey of magazine industry legal and copyright problems published by the Practicing Law Institute in 1979. The title is "Legal and Business Aspects of the Magazine Industry 1979" (G4-3656).

It is obvious that under this type of agreement, umbrellaed by clause (2) of section 101, the publisher gets the best of all possible worlds. The writer is an employee for the critical purpose of vesting control of the copyright in the publisher. For all other purposes, the author gets none of the benefits of an employment relationship, as Ms. Roth pointed out.

Three consequences flow from these agreements. First, the publisher is the author who initially becomes the copyright owner. Second, the term of copyright is 75 years from publication rather than life and 50 years. Third, the termination right, which is available to all free-lance authors to terminate long-term transfers of rights, is not available to authors who become employees for-hire in this ersatz manner.

The bill introduced by Senator Cochran will prevent the execution of these agreements. Its most important effect would be to restore to such freelance authors the right of termination. Actually, it will not help protect authors against being compelled to transfer their rights outright because there is nothing in the Copyright Act that prohibits any publisher from saying to an author: if you want me to publish your work in any media, I insist that you convey the copyright to me. Some book publishers—they are a minority—do that, and they are not covered by this section. Magazine publishers did it for a hundred years and, if this bill is passed, will continue to do it.

The only difference is that, if the bill is passed, the magazine will acquire the rights for only 35 years rather than in perpetuity or for the duration of copyright, because the author or the author's spouse and children will after 35 years be able to terminate that grant. That is a small consolation in most cases because the problems that authors and artists face arise within a much shorter period after publication.

Magazine publishers and other publishers and users who are protected by clause (2) of section 101 unlike book publishers, usually pay a flat fee. If they acquire all rights forever, what they are doing, in effect, is forcing a tie-in transaction on the author. They are saying: as a condition for your selling us and our accepting the first serial right, which we are really in the business of exercising by publishing your article, story, or illustration in this magazine,

you must also tie in all your other rights. As a result, when these subsidiary rights are exploited, they are exploited by the publisher rather than the author. Unlike book publishing, where the author gets 50 percent of all the income from those subsidiary rights, magazine authors and illustrators and other authors impacted by section 101 (2) do not share unless the publisher who has taken all the rights, at its whim, decides to give them a share.

That is the principal evil of both section 101 (2) and other provisions on the conveyance of copyrights.

So, we would say by all means pass S. 2044. But we would like the committee to consider at a later time proposals to remedy the more important problem, which is the publisher's still-uninhibited power, because of its superior bargaining position, to compel these tie-in transfers.

Senator MATHIAS. Just so we are clear on the record what we are talking about, Mr. Karp, you talk about subsidiary rights. Do you want to give us a few illustrations of those?

Mr. KARP. Yes.

Senator MATHIAS. Ms. Brickman gave the illustration of her experience, in which a drawing made for an illustration in a book was adopted for the more prominent role of jacket cover. Would that be the kind of thing?

Mr. KARP. Yes. Actually, in the field of publishing, they are much more significant financially. For example, the publishing right that the publisher exercises, the book publishing right if it is a book publishing house, or the magazine publishing right if it is a magazine publisher, is considered the primary right—but only because it comes first. One of the subsidiary rights in a book or magazine contribution is the right to make a motion picture out of it. Now, the money from the sale of motion picture rights can far exceed the money from book publishing.

Most authors of books are able, under our recommended contract and industry practice, to retain motion picture and similar rights. A magazine contributor who sells an article or story under either section 101(2), the for-hire section, or under an outright grant of all rights, would not share in the income from a motion picture based on his or her article. And there have been motion pictures based on articles or stories in magazines.

A more usual aftermarket is the reprinting of the magazine piece in other magazines or anthologies: for example in the Reader's Digest or in the Eastern Airlines Digest that you get when you come to and from New York or Boston—for which the second magazine pays a fee. If the author has signed away all rights or been compelled to, because no author does it voluntarily, all of that aftermarket income goes to the first publisher.

Recording rights, television rights, all of these are called subsidiary rights because they follow after the first publication.

Senator MATHIAS. When I earned an honest living as a lawyer—

Mr. KARP. I'm glad you said that.

Senator MATHIAS. I was a country lawyer and dealt with rather homely issues. We generally followed the rule that the calf goes with the cow. Now, why should not the calf go with the cow in this case, unless it is specifically agreed otherwise? There is some spe-

cial reservation that in the case of a particular calf it has got to be separated from its mother in the transaction.

Mr. KARP. The calf should go with the cow. The only reason it does not is that the person buying that first right insists on the calf, the cow, and everything else the publisher can get. Having superior bargaining power in many instances, he gets it. Where an author—

Senator MATHIAS. That calf and all succeeding calves.

Mr. KARP. All succeeding calves, yes.

It is only where an author in the magazine industry has sufficient bargaining power—and a few do—that they can reserve all other rights.

Some magazines are more enlightened than others. I do not mean to suggest that every publication follows this policy. But I would say hundreds of freelance authors who earn their living in the magazine industry are subject to the policy. Their publishers do not follow an enlightened policy. Some magazines go so far as to ask authors to sign an agreement which says anything you write for us in the future will be considered a work made for hire, even though the author is going to write as a freelance author and even though the work has not even been commissioned.

So, the use of the superior bargaining power accounts for this following of the calves after the cow.

Senator MATHIAS. Let me ask all of you this question. Suppose we adopt S. 2044. Will that stop buyers from the current practice of buying all the rights for a single price?

Mr. KARP. No, it will not. It will only stop them from doing two things. It will stop them from becoming the titular owner of the copyright, therefore eliminating the author's right of termination. It will stop them from converting the term of copyright from life and 50 to 75 years from publication. But it would not stop any publisher who so desired from insisting on acquiring all rights in the contribution, as publishers have done and would continue to do. There is need for additional legislation to deal with this problem. But S. 2044 is a good first step.

Senator MATHIAS. Do you want to say something on that point?

Ms. ROTH. Yes. While it is true that work for hire strips the writer of all opportunity for ever using his or her creative words, again in just the same order, all-rights sales can be just as insidious, as Mr. Karp said. The only redeeming feature about an all-rights sale is that the writer retains the copyright and may regain the right to use it after 35 years, if the writer lives that long. If this period of years could be shortened to a reasonable few years, giving a time of the essence to the publisher to use the right that they want and return the others to the author, this type of sale would be improved. Otherwise, it is in all likelihood as much of a financial disaster for a writer as work for hire because both types of sales strip the author of any chance to make a decent living despite having a great deal of ingenuity and talent.

I do have an example of one of our author's ability to spinoff other revenue. If you would like to hear it—I do not want to take your time—I would like to illustrate it.

Senator MATHIAS. Well, if you can do it briefly, yes.

Ms. ROTH. I will do it as briefly as possible.

One member of ASJA wrote a series of columns for Family Weekly magazine. One of them was sold for \$1,100 first North American rights only. The column became a chapter in a nine-chapter book published by Macmillan with an advance of \$7,500 for the book. The book also included other columns that were thus spunoff. The book rights have just returned to the writer, who may now sell it again as a paperback or in other forms. Meanwhile, the first column was sold for a second reprint right to Cosmopolitan magazine for \$500. This author only gives permission for one-time use. So, several foreign editions of Cosmopolitan magazine also purchased reprint rights for one-time use of the article. The Australian edition paid \$200. The Japanese edition was \$200. The French edition was \$150. The South American was \$150. The British edition was \$200. The Italian edition was \$100. Other chapters in this book were broken apart and sold in a similar way. One was sold to Kiwanis magazine for several hundred dollars. Another, which was originally sold to Family magazine for \$1,200, was sold to a corporate magazine, the John Deere Company magazine, for \$500.

This same author sold a short article to Working Woman magazine for \$400 and one to Working Mother magazine for \$500. An Australian magazine has just seen both of them and purchased them for \$300 each.

All of these articles and the entire book with its component chapter parts are the property of the author to sell again and again as possible. Writers are a cultural resource, but the original fees are so low that it takes this kind of reselling to make it possible to maintain a freelance writing career. Thank you.

Senator MATHIAS. That is a very interesting illustration, and I am glad you gave it.

Mr. CRAWFORD. Mr. Chairman, I would like to speak on behalf both of the Graphic Artists Guild and the American Society of Magazine Photographers to emphasize certain of the points that were just made by Mr. Karp and Ms. Roth. It really will not be of great assistance to our members if work for hire is simply eliminated and all-rights contracts are immediately used by the publishing community to replace them.

We feel that Senator Cochran's bill is a valuable initiative because, after 5 years of experience with the new copyright law, we have found, and in our submitted statement have shown, that the use of work for hire is overwhelming for our freelance community.

You cannot really analogize a commissioned author or artist who is doing an assignment to an employee. The employee is paid a salary. The employee works at the premises of the employer and under the employer's control. Ultimately, the idea and the expression of that idea and the financial risk all fall on the employer.

On the other hand, a freelancer is someone who is trained, who has his or her own studio, who carries that overhead, who, when they take an assignment, really takes the risk of the assignment. They are not paid a lump sum before they commence work. They have to wait until they have finished that work to the approval of the commissioning party. That approval is not something obtained on a day-by-day basis. They go away to their own studio, and they come back with a job which is either accepted or rejected. If it is

rejected, the usual risk is entirely on the freelancer to go ahead and complete it to the satisfaction of that party.

Senator MATHIAS. Let me ask you this question right on that point. I suspect that the publishers would say that the major risk is on them, that, true, the freelancer takes a certain amount of risk but also controls that risk because it is his or her own talent and his or her own creativity that is producing the product up to the point of sale. But, from the point of sale onward, the production, the distribution, the sale, all of that is at the expense of the publisher. Therefore, the publisher is taking the risk, the real financial risk here.

Mr. CRAWFORD. I would like to expand a little bit on what I said previously. The risk is truly borne by the freelancer. Take, for example, the photographers in the American Society of Magazine Photographers, who may expend tens of thousands of dollars on the equipment that is in their studios. They bring this to any assignment—as well as being leading professionals in their field. If there was not a reservoir of freelance talent such as this available for assignments, this work would never come into existence, regardless of whether the publishers wanted to give such an assignment.

Furthermore, in any contract with the publisher, it is not the publisher who bears the risk of such things as the indemnity clause. If there is a copyright infringement, the standard provision places that risk on the freelancer.

No salaried employee works under such conditions. A salaried employee is paid a salary and receives employee benefits regardless of satisfaction and the other matters I mentioned.

Mr. KARP. There is another distinction, Senator. In book publishing, the publisher does take a risk on that author's work. If the work does not meet the desires, needs—

Senator MATHIAS. It ends up on the remainder shelves and the publisher is out.

Mr. KARP. That is right. But a magazine publisher is not taking a risk on any particular contribution. First of all, his risk is really, on the magazine as an ongoing entity, usually underwritten by advertising. His risk has nothing to do with the merits of any given contribution. As Mr. Crawford says, he has the ultimate protection of peremptorily rejecting anything the publisher does not like. So, the risk is quite different in this area than it is in something like book publishing.

Senator MATHIAS. Let me ask you just one further question, Mr. Karp. Is there any situation in which work made for hire is appropriate? Is it useful in the textbook area? Are there any—

Mr. KARP. Ironically, the textbook area is one where it really is not necessary because a publisher can acquire the material on an all-rights basis, which they do. Book authors are not subject to section 101(2), I am glad and modestly proud to say. But the author of a book or a textbook can be compelled to transfer all rights subject to the termination right.

It is hard to believe that any textbook written in 1982 is going to be alive and usable 35 years from now. A large part of the argument by textbook publishers for this provision is totally meaningless. If the book has any value 35 years from now, it is not going to be as a textbook; it is just going to be as a general-interest book.

Senator MATHIAS. Is Herodotus a general-interest book?

Mr. KARP. I think so. I do not think anybody would be out selling it to the California board of education for adoption as a textbook.

Senator MATHIAS. Well, go down to St. John's College in Annapolis, Md.—

Mr. KARP. I know St. John's. That would be my exception to prove the general rule I am announcing.

Senator MATHIAS. Not good enough, Mr. Karp, not good enough. [Laughter.]

Mr. KARP. I did not answer the rest of your question, Senator. Is it ever appropriate? Actually, the only place that employment-for-hire has any real justification that I can think of is where the publisher hires authors on a regular basis, pays them a weekly salary, gives them all the benefits of employment such as staff writers on a magazine. Yes; that is an employment-for-hire situation that makes some sense. They are not being compelled to accept all the risks and vicissitudes that Ms. Roth and Mr. Crawford have mentioned.

Mr. CRAWFORD. Mr. Chairman, if I might just briefly address that. In our submitted statement we indicate that, to our knowledge, at least 7 out of the 10 of the top elementary and high school publishers are in fact using work for hire contracts when they can. Our experience has been that these are not negotiable contracts. In other words, one of our members cannot go and say: I don't want work for hire, may I have a limited-rights contract? The answer is that they will not work.

Senator MATHIAS. Thank you all very much for your testimony here. We will test it in the fire of the opposing witnesses and ask the publishers panel to come next. Then we will have the audio-video panel.

Without objection, we will insert into the record your prepared statements.

[Material referred to follows:]

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.

1501 Broadway, Suite 1907, New York NY 10036 • (212) 997-0947

STATEMENT FOR U.S. SENATE JUDICIARY COMMITTEE HEARING

RE: BILL #S.2044

The American Society of Journalists and Authors, a nationwide organization of independent nonfiction writers, representing 660 leading professional free lancers, is deeply concerned with the "Work for Hire" loophole that has emerged in Public Law 94-553. As independent creators whose livelihood depends on copyright protection, we urge you to approve the amendment to that law as proposed in Senate Bill 2044 which will put a stop to the coercion of writers to sign away all rights to their copyrighted works or, if unwilling to do so, be denied the opportunity to sell their creations.

Under the old copyright law, publishers frequently registered the copyright under the name of the publisher rather than the name of the author. It was the intent of the 1976 copyright law 94-553 to stop that and assure that writers can and will enjoy the rightful fruits of their labors. The copyright can be considered to represent a bundle of separate rights which can be sold or licensed, either separately or all at one time. Customarily, a free lance magazine writer sells the first North American publication rights to a magazine publisher, and negotiates whatever additional rights the publisher may wish to purchase for additional remuneration. The author retains the copyright and all other rights such as foreign reprint rights, movie and television rights, audio tape rights, future reprint rights, and possible newspaper syndication or reworking of the material which could assure financial security for the self-employed creator.

The revised copyright law of 1976, which took effect on January 1, 1978, clearly intended ownership of a work to be vested in the creator of that work, who would then be able to sell as many publication rights as he or she sees fit. Usual practice in

the magazine publishing industry calls for the sale of first North American publication rights only by the author. If other rights are desired by the publisher, it is customary for negotiation to take place, with additional payment for any additional rights that are sold by the holder of the copyright, the author.

Instead, some publishers have seized the wording of part (2) of the "work made for hire" explanation dealing with "a work that is specially ordered or commissioned for use as a contribution to a collective work" as an excuse to write contracts that give themselves the copyright and all the inherent rights therein. The contracts that are offered by these publishers are considered by our membership to be an act of piracy. These contracts demand that the author warrant that he or she is the sole creator of the work but provide that all rights, including the copyright, be turned over to the publisher forevermore, with no further negotiations or financial interest by the creator in the creation permitted. In such contracts, the publisher claims to be considering the writer an employee, while other paragraphs in the same contract declare that the employer is not responsible for customary benefits to employees -- such as weekly pay checks, contributions to Social Security payments, paid vacations, sick-leave benefits, group insurance, unemployment insurance, worker's compensation insurance, pension plans, and other perquisites of hired workers. In these contracts, the supposed employee is often required to indemnify the publisher for the defense of any claim arising from the publication of the article. Thus, while the 1976 Public Law 94-553 rightfully revised the copyright law to improve protections for the creative community, self-interested and self-serving companies lost no time in finding a loophole they could twist to deny that intended protection.

One magazine worded such a paragraph this way, "In all respects other than under the copyright law, you shall function as an independent free-lance contributor, not as an employee of the company."

The same magazine contract reads this way on work for hire: "...commissions you to prepare the above-described work, which shall be considered 'work made for hire' and will be used as a contribution to a collective work. That means the magazine will be the owner of all rights to your material throughout the world in all languages. The magazine and its licensees shall also have the right to use your materials and your name, likeness, biography, and photograph for editorial, advertising, trade and/or promotional purposes."

Several of our members reported receiving a memorandum to regular contributors from The New York Times, herein quoted verbatim: "The copyright law requires that we spell out the basis for transactions with you. This memorandum governs all assignments, whether we make them over the telephone or in writing. This is necessarily an all-inclusive statement and covers those who write for the daily paper, the Sunday magazine, the Book Review, etc. Our standard agreement with contributors is that all their material accepted by The New York Times is considered "work made for hire". This gives us all rights in the material throughout the world for which they are paid the regular fee, per diem page rate or whatever is agreed at the time of the assignment. This does not change the fact that when you write for The Times you do so as an independent free-lance contributor, not as an employee of The Times. Acceptance of your next check constitutes acceptance of this policy. Please refer any questions to the editor with whom you regularly deal."

Another contract of a popular magazine has a simple letter form to sign. The first paragraph names the assigned article. The second paragraph distorts the law's intent in this way: "In order to comply with the new Copyright Law's technical requirements, please sign and return the enclosed copy of this letter to signify your agreement that this contribution will be considered a "work made for hire," which means that we own all rights, title and interest in it throughout the world, and that

you will receive \$_____ in full payment of your services in writing this contribution."

At this point, any sensible business person might well ask, "Why deal with such a publisher?" Our members have been cautioned not to sign such an agreement for their own good and for the good of their fellow creative writers. But, rent must be paid, children must be fed and clothed, and frequently -- despite the knowledge that to sign once is to give away all rights forever -- the writer is forced to sign or lose the opportunity to sell the manuscript. Once such a contract is signed, the writer is never to have a chance to negotiate, never to have a chance to reprint or resell, or even to use in a book of one's own, material that may have taken many more research and writing hours than has been included in the payment. This is just the situation that the revised copyright law was intended to correct.

It has also come to our attention that a number of publishers have actually made up two different contracts. One is a work-for-hire agreement such as has been described, and when that is bravely refused by wise writers, another contract is offered which contains the proper wording of copyright ownership by the writer and the ability to negotiate the numerous rights that the publisher may desire to purchase for extra payment. It takes an experienced writer with clout in the marketplace to refuse the first contract. While many of our members enjoy such status, there are a lot of talented beginners who are unaffiliated and understandably afraid to reject what they are told to be standard contracts. It is important that this first unfair contract offering be eliminated so that inexperienced writers are not bilked of their assortment of rights -- or their entire copyright.

Several of our members have been told that they had to sign a work-for-hire contract or no longer be given assignments. The insidious element here is that while a contract is supposed to be a negotiated conclusion to an agreement, such action by these unscrupulous publishers is an act of coercion. Sign, or no work!

This puts the self-employed, non-union, non-organized writer in an unequal and unfair bargaining position. A small number of publishers have the entire industry tied up, while a large and relatively unorganized population of free-lance writers, artists, and photographers need an outlet for their creative efforts. Thus there is a specialized, concentrated industry on one side, and on the other a highly competitive and unorganized population of talented people who need the protection of a just law to be able to continue to create and survive financially.

The continuing and increasing specialization of periodicals suggests that writers have a limited number of markets for article ideas. In certain cases this may mean that the only buyers for some writers or for certain ideas may be publications that use unfair practices. We are also concerned that as more publishers consider entering the lucrative area of electronic publishing, they may feel a greater desire to own full rights to material they publish. More and more publishers may apply economic pressure to acquire the copyrights for their own use without fair compensation to the author. Writers will need protection to assure that their rights are sold rather than given away.

The American Society of Journalists and Authors does not believe that it was the intent of the revised copyright law to turn creative workers into hirelings who must turn over their inherent rights upon demand. We urge you to take the necessary steps to remove the wording that is causing this problem, as specified in the bill known as S.2844, introduced by Senator Thad Cochran. This will limit work-for-hire to the supplementary material in a publication and enable the creative writer to be able to negotiate the sale and transfer of rights without economic coercion.

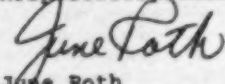
Writers who rejoiced over the new copyright law's enactment and looked forward to its taking effect in January 1978 learned, to their dismay, that their protection might be short-lived. As early as April, 1978, the American Society of Journalists and

Authors made a statement of position on the occurrence of abuses of "Work Made for Hire" (see attached copy).

Our members began to report the receipt of contracts that were coercive in tone, forcing writers to sign over all rights including the copyright itself, or lose the sale of the proposed manuscript (see attached examples of "work for hire" contracts).

The American Society of Journalists and Authors' premonition of emerging problems caused by the loophole found by some publishers has become a reality. The loophole has been used as a major financial obstacle to the fair and equitable reward for creative talent in the four years since that statement was issued. In our view, these publishers' demands that our free-lance members perform "work for hire," as employees in the eyes of the law, but without any of the benefits or protections of employees, is unconscionable. We also believe that these practices could ultimately inhibit the free flow of ideas and information which is so precious to all Americans. We fervently hope that Bill #2844 will correct this unfortunate situation, and we urge affirmative action on this bill by the Committee and by the full congress.

Respectfully submitted,


June Roth

President, ASJA

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.
 1501 Broadway, Suite 1907, New York NY 10036 • (212) 997-0947

On "Work Made for Hire": A Statement of Position

ANNOUNCED APRIL 28, 1978

It has long been the established practice for responsible periodicals, in commissioning articles by free-lance writers, to purchase only one-time publication rights—commonly known as "first North American rights"—to such articles, the author retaining all other rights exclusively and all revenues received from the subsequent sale of other rights reverting to the author.

This practice is affirmed by the Code of Ethics and Fair Practices of the American Society of Journalists and Authors (ASJA), the national organization of independent nonfiction writers. The philosophy underlying this tradition has been further reaffirmed by the Copyright Law of 1976, which took effect in January of 1978 and states explicitly that copyright is vested in the author of a work and commences at the moment of creation of that work. "Copyright" is, literally, the "right to copy"—i.e., to publish in any form; that right is the author's, transferable only by written agreement and only to the degree, and under the terms, specified by such agreement.

It has come to the attention of the ASJA that certain periodical publishers have recently sought to circumvent the clear intent of the law by requiring independent writers, as a condition of article assignment, to sign so-called "all rights transferred" or "work made for hire" agreements. "All rights transferred" signifies that the author, the recognized copyright owner, transfers that ownership—and the right to all future revenues that may accrue therefrom—to the publisher. A "work made for hire" agreement specifically relegates the independent writer, so far as the article under consideration is concerned, to the status of an employee and creates a mythical—but nonetheless presumably legally binding—relationship in which the author agrees to function as a hired hand, while the publisher assumes the mantle of "creator" of the work, with all the rights of ownership vested in the creator under the law.

Both types of agreement clearly presume that the work being produced has an inherent value beyond one-time publication. Both the law and the ASJA Code of Ethics recognize that presumption, and it is the intent of both documents that the transfer of any rights beyond one-time publication take place only as the result of negotiation that assigns a monetary value to each such specific right a publisher seeks to acquire. Both types of agreement described above deny the author's basic role as owner and creator and seek to wrest from the writer, even before the work has been produced, all future interest in revenues that may derive from that work.

This effort, subverting the intent of the law and contrary to ethical publishing trade practices, is condemned by the American Society of Journalists and Authors. The demand for blanket assignment of all future right and interest in an article or other creative work simply will not be met by responsible independent writers. Publishers who persist in issuing such inequitable agreements in connection with commissioned works will find that they have done so at the certain risk of losing a healthy flow of superior professional material. The result, for those periodicals, is likely to be a sharp and inevitable decline in editorial quality—an erosion and debasement of the standards on which periodicals must rely in order to attract readers and maintain their own reputations.

Rolling Stone

745 Fifth Avenue, New York, New York 10022 (212) PL 8, 3800

RE: CONTRIBUTOR'S AGREEMENT

Because of the new Copyright Act effective January 1st, 1978, we wish to enter into a written agreement with you as one of our contributors, having the following terms:

1. Each of us agrees that the terms of this agreement will be applicable to all the articles that you write (or have written) and that are published in ROLLING STONE after January 1st, 1978 (the "Works"), it being agreed that we are purchasing from you all right, title and interest in the Works and that these are works made for hire and have been or will have been commissioned by us as a contribution to a collective work.

2. At the time of each assignment we will agree upon the fee to be paid if the resulting Work is published, the amount of the kill fee if it is not, as well as any expenses that will be reimbursed.

3. You warrant the originality, authorship and your sole ownership of each Work and all rights in that Work, that the Work will not have been previously published, that the contents of the Work will be truthful and that publication of the Work will not infringe upon any copyright, proprietary right, or any other right.

4. (a) Six months after initial publication in ROLLING STONE, we will, at written request, assign to you on our standard form all rights in a Work except performance rights and the following rights, which we shall retain: (i) exclusive worldwide periodical and syndication rights in all languages, in either full or condensed version (with the net revenues from republication of the Work pursuant to a syndication agreement to be shared equally); (ii) exclusive worldwide reprint rights in all forms for any whole or part edition(s) of ROLLING STONE; (iii) nonexclusive worldwide reprint rights for any anthology or collection of ROLLING STONE material (an additional payment to be made to you for such republication at our then-prevailing rates); (iv) worldwide rights for advertising and publicity purposes in all media by or for ROLLING STONE or any foreign edition(s) of ROLLING STONE; and (v) exclusive worldwide rights in all languages to publish or to license the publication of a full or condensed version in any other print media (with the revenues derived therefrom to be shared equally).

(b) Nine months after initial publication, we will, at your request, assign to you performance rights, e.g., motion picture, TV, theatrical rights, in the Work on our standard form, it being understood that the revenues from such rights (whether derived before or after such assignment) shall be divided between us pursuant to mutual agreement.

5. You agree that ROLLING STONE will receive suitable credit upon the exercise of any of the rights assigned to you. You hereby authorize us to use your name for advertising and publicity purposes in connection with ROLLING STONE.

6. This letter contains the entire and complete understanding of the parties and shall be construed under the laws of New York. Any amendment must be in writing and signed by both of us.

If the foregoing correctly sets forth our agreement, please sign and return one copy to us.

Very truly yours,

ROLLING STONE
STRAIGHT ARROW PUBLISHERS, INC.

By:

I hereby agree to the foregoing, which will be applicable to all articles supplied by me and published by ROLLING STONE after January 1st, 1978.

Author: Dated:
Social Security Number:

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AUTHOR CONTRACT

Dear [REDACTED]

This is to confirm your agreement with us effective as of the date of this letter, with regard to

[REDACTED]

(the "Work")

you

1. You hereby (a) agree to create the Work for us based on the theme originated and suggested by ~~us~~ or (b) represent that you have created the Work independently of all other agreements between you and any other person.

2. You hereby sell to us and we hereby purchase from you, as a work made for hire, all right, title, and interest in and to the Work, including (a) its title and theme; and (b) all the right to copyright the Work, and any adaptation or version of it in the United States or anywhere throughout the World, in our name or otherwise for our sole benefit, and to secure renewals or extensions of such copyrights in our name or otherwise.

3. We agree to pay to you a fee of \$ [REDACTED] (the "Fee"), after final acceptance by us of the Work. If the Work is to be created by you under paragraph 1 (a) above, you shall deliver the completed Work to us no later than [REDACTED], time being of the essence. If we in our sole discretion decide not to accept the Work, you shall receive 25% of the Fee and we shall return the Work and assign all rights in it to you.

4. In order to induce us to make this purchase, you represent and warrant that: (a) you are or will be the sole author of the Work and have made no commitments with any others with respect to it or its use; (b) the Work is original, and does not infringe upon any statutory or common law copyright, proprietary right, or any other right of any other person; (c) the statements in the Work are or will be true (unless the Work is described above as fiction); and (d) the Work has not heretofore been published or used in any medium for any purpose.

5. You shall indemnify and hold us harmless from any and all loss, damage, and/or expense (including reasonable attorneys' fees) that we may suffer or incur by reason of any claim or the defense of any claim, arising from the falsity, or alleged falsity, or the breach or alleged breach, of any of the foregoing representations or warranties made by you in this agreement.

6. We have the right to edit or otherwise change the Work. You also agree to make such changes in the Work as we may, from time to time, reasonably request prior to publication. We are under no obligation to publish the Work in our magazine or otherwise apply the Work to any specific purpose. You hereby agree to our using your name, pseudonym, photograph or other likeness in connection with the advertisement and promotion of the Work or any adaptation or versions thereof or the magazine in which it appears.

7. This Agreement constitutes our entire agreement with respect to the Work and supersedes any prior agreements. It may not be modified without the prior written consent of each of us.

8. If this Agreement is signed on behalf of the author by an agent or publisher, such agent or publisher independently represents and warrants that such signature has been duly and validly authorized by the author and that this agreement will constitute a binding obligation of the author as a result of such signature.

If the foregoing correctly sets forth our understanding, please indicate by signing in the space provided below. This contract shall be effective when having been signed by you it is received and then signed on our behalf.

Very truly yours,

OMNI Publications International, Ltd.

By: _____

I hereby approve and confirm the foregoing.

Signature of Author/Agent/Publisher

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The New York Times220 WEST 43 STREET
NEW YORK, N. Y. 10036MEMORANDUM TO REGULAR CONTRIBUTORS

The copyright law requires that we spell out the basis for transactions with you. This memorandum governs all assignments, whether we make them over the telephone or in writing. This is necessarily an all-inclusive statement and covers those who write for the daily paper, the Sunday magazine, the Book Review, etc.

Our standard agreement with contributors is that all their material accepted by The New York Times is considered "work made for hire". This gives us all rights in the material throughout the world for which they are paid the regular fee, per diem page rate or whatever is agreed at the time of the assignment.

This does not change the fact that when you write for The Times you do so as an independent freelance contributor, not as an employee of The Times. Acceptance of your next check constitutes acceptance of this policy.

Please refer any questions to the editor with whom you regularly deal.

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AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.

1501 Broadway, Suite 1907, New York NY 10036 • (212) 997-0947

Enclosed are additional examples of contracts that seek to acquire the copyright and all rights for the publisher by use of the "Work for Hire" loophole in the Copyright Law.

Note that the letter and diary of events leading to the Money magazine offering, show that the author proposed an idea, refused to sign a "Work for Hire" contract, and the editor took that idea and assigned it to another writer!

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Better Homes and Gardens

Let us at 1711 • The Mall • Iowa 50319 • 319-264-3100

September 8, 1981

Dear

Quite possibly you're aware that the new Copyright Law, which went into effect January 1, 1978, requires certain action in order that the work we receive from free lance contributors will continue to meet Meredith's requirement to have full rights to the material we publish.

In setting up the assignments free lancers do for us, we use a single agreement that covers all of the necessary points in advance. This way all subsequent separate assignments and correspondence pertaining to them need not deal with legal terms. Instead, we'll be in position to simply concentrate on the individual assignments, the schedules, and the payments to you. In short, we can deal with the legal aspects once and for all and then focus on the work at hand.

We want to emphasize that our requirements to have full rights to material we purchase are the same as they've always been. We're simply taking this necessary step to enable us to continue fulfilling this need.

We're enclosing the agreement for your review. Will you please sign one copy and return it for our files. The assignment cannot go into effect until the signed agreement is received.

Many thanks for your cooperation. We look forward to working with you.

Cordially,

Margie Daly
Margie Daly

MD:ah

*M*eredith

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MASTER AGREEMENT

This is an agreement under Iowa law and Federal law, between
(CREATOR) and Meredith
Corporation (MEREDITH), Des Moines, Iowa which shall remain effective until terminated in writing as provided in paragraph 6.
CREATOR and MEREDITH therefore make the following promises:

WORK
MADE
FOR
HIRE

1. CREATOR shall from time to time create separate works, such as contributions, articles, photos, etc. (hereinafter WORKS) for MEREDITH as requested by MEREDITH. During the term of this agreement all of the WORKS created by CREATOR for MEREDITH are "work made for hire" unless specifically designated otherwise in writing by CREATOR and MEREDITH.

However, in the event any WORK is not a "work made for hire" CREATOR hereby assigns and transfers all right, title and interest in the WORK and any copyright in the WORK to MEREDITH effective as of the date the WORK was created. CREATOR further agrees to cooperate and execute any assignment or other document necessary to secure total ownership rights of all WORKS in MEREDITH since the intent of this agreement is to vest all copyright and ownership rights in the WORKS in MEREDITH including, but not limited to, all copyrights, all extensions of copyright, all copyright renewal rights, all derivative rights, and all rights to reproduce, publish, perform and display the WORKS.

PAYMENT

2. In return, MEREDITH shall pay CREATOR for the separate WORKS an amount to be determined by CREATOR and MEREDITH. This Master Agreement may be supplemented from time to time by separate writings (generally known as work acceptance letters, day rate photography forms or manuscript billing forms) which specify WORK to be created.

REVERSIONARY
RIGHTS

3. In the event any assignment or transfer of a WORK is subsequently terminated in the manner provided by the Copyright Act of 1976 (17 U.S.C. Sec. 203) and the owner of the termination interest in the WORK shall offer to assign, license or otherwise transfer the WORK or any part of the WORK to others, that owner shall first offer MEREDITH the right to secure the same interest upon the same terms and conditions as offered to others. MEREDITH shall accept or reject such an offer within thirty (30) days of receipt.

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CREATOR'S
WARRANTY

4. CREATOR warrants and represents that to the best of CREATOR's knowledge all WORKS submitted hereunder are original and have not been previously published or, if previously published, that written consent to use has been obtained on an unlimited basis; that to the best of CREATOR's knowledge, all WORKS or portions thereof obtained through CREATOR from third parties are original or, if previously published, that written consent to use has been obtained on an unlimited basis; that CREATOR has full power and authority to make this agreement; that to the best of CREATOR's knowledge the WORK prepared by CREATOR does not contain any scandalous, libelous, or unlawful matter. CREATOR will hold MEREDITH harmless for any breach of this warranty. CREATOR does not warrant originality of any materials provided by MEREDITH to CREATOR.

NO OBLIGATION
TO PUBLISH

5. MEREDITH is not obligated to publish the WORK. MEREDITH has the right to edit the WORK and use the WORK in any manner desired and also has the right but not the obligation to identify the CREATOR.

RIGHT TO
TERMINATE

6. This agreement may be terminated by either party upon forty-five (45) days written notice to the other.

NOTICES

7. All notices and payments made with respect to this agreement shall be addressed as follows:

When to MEREDITH:

When to CREATOR:

Editorial Development and
Planning Manager
Meredith Corporation
1716 Locust
Des Moines, Iowa 50336

NON-ASSIGN-
ABILITY

8. This agreement is non-assignable by CREATOR.

BINDING
EFFECT

9. This agreement is binding upon the heirs, executors, administrators and successors to any of the CREATOR's rights.

INDEPENDENT
CONTRACTORS

10. Both CREATOR and MEREDITH are and shall continue to be independent contractors and neither shall be or represent itself to be, an agent, employee, partner or joint venturer of the other.

MEREDITH and CREATOR accept and agree to all of the promises set forth.

MEREDITH CORPORATION

CREATOR

By: Neil Kuehn

Title: Editor-in-Chief

Date: September 8, 1981

9/15/81

Meredith person requesting master: Margie Daly

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Money

TIME & LIFE BUILDING ROCKEFELLER CENTER
NEW YORK, N.Y. 10020 AUSA 6-1212

ROBERT J. KLEIN, Senior Editor

December 4, 1979

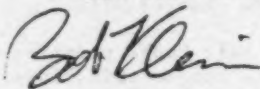
Dear [REDACTED]

I'm enclosing a new set of contracts because our attorneys advise us not to accept your revisions. Our position is this: MONEY magazine makes a considerable investment in freelance assignments and contributes quite significantly to the published article. We guarantee half the fee and all reasonable expenses whether an article is published or not. We commit ourselves to the production of graphics (photos, drawings etc.). More than many other magazines, our editorial staff also puts much time and effort into the preparation, editing and fact-checking of each article. The published article is often considerably improved by staff efforts.

This is at some variance with the implications in the position paper of the American Society of Journalists and Authors. It characterizes the author as the sole creator of the work. In our experience, at least, the magazine staff collaborates in creating the published article.

If you aren't willing to sign the contract as written, I'd appreciate hearing from you right away, so that we can make other arrangements.

With best wishes,



Bob Klein

RJK/ncr

OUTLINE OF EVENTS with "Money" magazine and agreement letter.

December 1979. Evelyn Kaye

1. On September 19 I sent "Money" three ideas. After a follow-up phonecall, Robert Klein, an editor there, called me and asked me to do an article on one of them, on religion and taxes. We discussed the arrangements and it was a pleasant talk.
2. I made a few preliminary calls for the piece. Then the enclosed agreement letter arrived. I called Klein and asked about two things:
 - a) all rights whatsoever
 - b) the rights to my reference materials
 He said that they "like to have" all rights, though they treat writers fairly if there are reprints. They want to keep the research to stop the writer doing the same piece for a rival magazine.
3. I crossed out "all rights", wrote in "first North American rights", decided that the reference materials clause would be immaterial because he would like the piece, and signed.
4. Klein called back. The lawyers would not accept an altered letter of agreement. We talked about it again, and I said I really didn't know what to do, because I really wanted to do the piece. He sent me two more agreement letters.
5. I spoke to Grace Weinstein, Julian Block and Norman Schreiber who have written for "Money." Apparently this is a new development and they had not seen this letter before, though Time/Life magazines are always tough with freelancers. It is also possible to negotiate around the agreement "in real life," even if you sign.
5. I called Klein again, and tried to persuade him that it would be more in keeping with the new Copyright Law if I amended my letter. He said "I hate that letter but we have to live with it. We need all rights in case we reprint in our annual journal, and if you won't sign, I'll give the story to another writer." I thought about it overnight and called him back. "I don't like the thought of that piece of paper lying in some lawyer's file with my name on it." He said "Then I'll give the piece to someone else."
6. I made one call back, pointing out it was my idea in the first place, but he said "ideas are in the public domain and this one has been around for a couple of years, though your suggestion did spark it off." End of saga: December 7.

[REDACTED]

This will confirm our arrangement for you to write for MONEY magazine an original, unpublished 1,200-word article about _____.

For all rights of whatever sort including copyright throughout the world to the manuscript and supporting material, which shall be delivered by December 19, 1979, MONEY will pay you \$1000, to be paid half on delivery and half when your contribution has been set in type for publication. In addition, we will reimburse you for reasonable expenses incurred in preparing the article; receipts for items of \$25 or more should be sent along with your expense account.

In the event that the manuscript is not set in type for publication, it is expressly acknowledged that, nevertheless, MONEY shall be the sole proprietor of all rights to all material created by you under this agreement, and shall have the right to utilize it as source or reference material as it may determine.

Signed:

outside contributor

editor

DATE:

SUPPLEMENTARY TESTIMONY

REGARDING

WORK FOR HIRE UNDER THE COPYRIGHT ACT

PRESENTED BY

ROBIN BRICKMAN

GRAPHIC ARTISTS GUILD MEMBER

There were several statements made at the hearings after my panel was heard, that, both as an individual artist and a member of a professional artists' organization, I can't let pass.

I stand by my illustrations. They speak for themselves in terms of my talent, professionalism, and artistic integrity. They are viable entities that can be sold in the marketplace. They are in no way insignificant contributions to the work that they grace. I should not be prevented from claiming my own creations.

The great majority of artists are not stars. The fact that James Michener can negotiate any contract that he wants is not only debatable but also irrelevant to the problems faced by professionals at all levels. I resent the implication that I am a neophyte. My credentials include work successfully completed for satisfied clients such as Doubleday, Houghton Mifflin, the New Yorker, Horticulture Magazine, Rodale Books, the New York Times, and Little Brown.

The idea of practice makes perfect would be acceptable, though insulting, if it applied to negotiations on a limited use contract. However, in my experience and the experience of my colleagues, work for hire obliterates the opportunity to bargain. If the buyer becomes the creator, what is left to negotiate?

Work for hire is used for jobs that do require a lot of creativity. For example, in my Doubleday job, the publisher simply asked for two illustrations for each chapter, one for the title page and one for the epilogue. I was told the sizes and given a of the manuscript. I had to decide what to draw and how to draw it. All creative aspects of the work left to me, yet the contract called this work for hire.

Even on assignments where the art director does rough sketches inhouse, the reason they seek an outside illustrator is the skill and creativity that I as a professional visual communicator bring to my work. If the inhouse art were completed to such a degree there would be no reason to come to me at all. In every case, the art director seeks me out because of the creative expression I bring to the assignment.

Work for hire is an unconscionable interference in the marketplace. It absolutely prevents me from negotiating a value for value exchange. Rather than carefully balancing and reconciling the respective interests of buyer and creator, it puts all the eggs in the buyer's basket.

When the copyright law was originally debated, neither I nor the organizations representing my interests were present. To contend that the "debate" was a complete and exhaustive review, as was contended, is a specious argument since artists like myself were not represented at that time. In fact, the Graphic Artists Guild did not exist at that time. Its remarkable growth over the last five years is a product of work for hire and other survival issues that affect people like me.

My understanding is that the copyright law derives from the Constitutional requirement for protection for creators. Work for hire is a provision of that law that clearly provides windfalls and protections for the buyers of art.

It is hard to believe that a billion dollar company like Time, Inc. would suffer financial ruin by offering me and my colleagues an equitable opportunity to bargain. It should hardly be necessary for me to point out that the most skilled negotiator would fail when faced with the standard 'take it or leave it' work for hire contract.

To assume, as representatives of the multi-billion dollar publishing industry appear to, that once a law is written, it cannot be evaluated and amended, is to ignore two hundred years of lawmaking.

SUPPLEMENTAL TESTIMONY REGARDING
WORK FOR HIRE UNDER THE COPYRIGHT ACT

PRESENTED BY

THE AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS

&

THE GRAPHIC ARTISTS GUILD

I. INTRODUCTION

The American Society of Magazine Photographers and the Graphic Artists Guild would like to thank the Judiciary Committee and Senator Mathias for the opportunity to address the problem of work for hire. Our Constitution provides that, "the Congress shall have the power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...." In practice, work for hire has been used to secure these exclusive rights for commissioning parties instead of the true free-lance creator. S.2044, introduced by Senator Cochran, represents a valuable initiative in returning to the intent of our Founding Fathers.

A number of different abusive practices under work for hire were documented in our prior written submissions and the testimony given at the hearing itself on October 1, 1982. In this additional submission, we wish to deal mainly with what we believe would be a fair elaboration of S.2044. Any bill must, of course, satisfy not only the needs of the creators, but also the needs of the purchasers of rights of usage.

II. WHO BEARS THE RISK?

Before discussing remedies, we would like to examine more closely one of the publishers' central arguments - that they deserve to own the copyrights in commissioned works because such

works would never come into existence except for the capital risk taken by the publishers.

However, photographers and other creators take a risk also. They form a highly skilled pool of authors willing to risk the absence of a regular paycheck each week in order to pursue their own special artistry. Each photographer or other creator has his or her own style, gained after years of training and professional work. The photographs, illustrations and articles created by such a professional are hardly the result of a publisher deciding to pursue one project or another. They are the result of that creator's training and talent and may be far more valuable than their use on the publisher's single project might indicate. Most photographers and other creators resell their work. For photographers, stock houses represent a ready way to transmit images to the market for resale. A stock house is like an archive or library of images. When an image is licensed, the stock house and the photographer split the fee equally. A photographer who works for hire will never have this extra value to support him or her. In fairness, it might be more accurate to call the publisher the immediate cause for a photograph being taken, but the genius of the photographer or other creator is the ultimate and more profound cause for the existence of the creative work.

Even in mundane terms, it is incorrect to say that the publisher takes all the risk. The free-lance photographer may have invested tens of thousands of dollars in equipment, pays rent in a studio, has other overhead costs such as insurance, etc. The photographer does not get paid prior to commencement of the assignment - as an employee would certainly expect. The photographer or other creator is usually paid 30 to 90 days after work is turned in to the publisher - and sometimes the creators must wait even longer if they are paid on publication. Also, the assignment must be satisfactory to the publisher who

has commissioned it. Unlike the employee who will be paid even if work must be redone, usually the photographer or other creator must do the work until it is satisfactory. But the risk does not end when the assignment is accepted by the publisher and when payment is finally made. Invariably, the publisher has used its bargaining strength to force the creator to indemnify the publisher against risks of copyright infringement and other lawsuits, including the payment by the creator of the publisher's costs and legal fees. So the creator's risk continues for as long as the publisher continues to exploit its book or other product.

In fact, in terms of artistry, training and performance at professional standards, we don't understand why there should be any difference at all between creators who work for themselves and those who work on assignment. We accept such a distinction because it is so deeply ingrained in the structure of our present copyright law, but the evidence does not support the distinction that the publishers have sought to establish.

III. WHY NOT COLLECTIVELY BARGAIN?

We have been asked why the American Society of Magazine Photographers and the Graphic Artists Guild cannot negotiate collectively on behalf of their respective professional memberships. If our members cannot individually negotiate on a value for value basis, why can't our organizations collectively obtain better contractual terms? Quite simply, both the American Society of Magazine Photographers and the Graphic Artists Guild have members including a substantial proportion of free lancers. These photographers and artists are highly skilled, work from their studios without close supervision, have deadlines, are usually paid only if their work is satisfactory, and often have to indemnify users against copyright infringement or other lawsuits. Independent contractors like these face anti-trust restraints and adverse N.L.R.B. rulings in seeking to bar-

gain collectively. Thus, while our members receive no employee benefits when they are treated as employees under work for hire for copyright purposes, our organizations likewise do not have union status when our members are treated as employees for copyright purposes. The best place to treat this problem is in the copyright law, both because this law is intended to protect authors' rights and because the work for hire provisions are part of the copyright law.

IV. REMEDIES

Work for hire has created a number of abuses, some of which are more easily corrected than others. Our basic goal is to see that the creator's concerns are respected when the needs of creators are balanced with those of purchasers of usage rights. We will discuss each problem in turn, proposing specific amendatory language when appropriate. The sections of the copyright law that would be affected appear without any modifications in Appendix A. In our proposals in the text, we will underline new matter and put dashes through matter to be deleted.

A. WHEN MUST A WORK-FOR-HIRE CONTRACT BE SIGNED?

Clause (2) of the work-for-hire definition requires that "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." The word "shall" implies that the contract should be signed prior to commencement of work, but this implication has not been clear enough to prevent certain buyers from refraining from signing or even offering a written contract until after the commencement of work. The drafters of the 1976 law clearly believed work-for-hire contracts would have to be signed prior to commencement of work. Thus, Barbara Ringer of the Copyright Office stated in Discussions and Comments on the 1964 Revision Bill that, "It would not be considered a 'work made for hire' if the contract were signed later on - after the work was written, for example." (Copyright Law Revision, Part 5, p.145)

In many cases we find publishers wait until after work on an assignment is underway or completed before presenting the author with a work-for-hire contract. This is done even when no discussion of a work-for-hire contract has taken place and the creator has never previously done work for hire for the client. In fact, some publishers go so far as to put the work-for hire contract on the back of a check. The effect of this is to further attenuate the free lancer's power to bargain. Since payment is usually made 30 to 90 days after satisfactory completion of the assignment and sometimes not until publication, the photographer or other creator is faced with simply losing all the time invested in the project if the work-for-hire contract is not signed.

We would therefore propose that this clause be amended to read as follows: "if the parties expressly agree in a written instrument signed by them prior to the commencement of any work that the work shall be considered a work made for hire."

B. WHO OWNS THE PHYSICAL WORK OF ART?

It is unclear under a work-for-hire contract who owns the physical work that is created. While the commissioning party is the author for purposes of copyright, the copyright law does not definitively determine whether the commissioning party or the creator should retain ownership of the physical chrome, illustration, manuscript, etc. Section 202 provides that, "nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." However, work for hire does not require the transfer of a copyright or an exclusive right, since the commissioning party is vested with the copyright as an author.

Original photography, art, and even manuscripts can be very valuable. There are thriving markets for original photography and art. Nor is there any compelling reason why parties using

work-for-hire contracts should own originals when parties using all rights contracts do not. Loss of the original is simply the loss of yet another source of future income for the creator. For this reason, we believe that the sale of an original should have to be embodied in a written agreement. We would therefore modify Section 202 to read: "nor, in the absence of a written agreement expressly conveying property rights in a material object, does transfer of ownership of a copyright or of any exclusive rights under a copyright or the entering into of an express agreement in a written instrument that a work shall be considered a work made for hire convey property rights in any material object." The states of California and Oregon have enacted legislation to require a written transfer of originals when creators are selling reproduction rights.

C. WHO IS AN EMPLOYEE?

Another constant problem is the question of who is an "employee" in clause (1) of the work-for-hire definition. Essentially, common law standards for distinguishing between an employee and an independent contractor must be used. This causes great uncertainty, since each case must be determined on its own facts. This issue is discussed in the recent case of Aitken, Hazen, Hoffman, Miller v. Empire Construction Company, 542 F. Supp. 252, 257-58 (U.S. District Court, Nebraska) in which an architect was found not to be an employee of a commissioning party.

An employee who receives a salary knows that he or she is an employee. However, someone paid on a fee basis or in royalty form would not normally be aware that he or she might be an employee. For this reason, clause (2) of the work-for-hire definition requires a written contract if work is to be considered as done for hire. We believe that no third category of work for hire should be possible. That is, anyone other than a salaried employee should always have to sign a written instrument in order to do work for hire. Otherwise, the employer is

essentially gaining the benefits of being an employer under the copyright law without fulfilling the obligations of being an employer under the social security, income tax and related laws. We would therefore change the clause (1) definition of work for hire as follows: "A 'work made for hire' is - (1) a work prepared by a salaried employee within the scope of his or her employment..."

D. WHICH CATEGORIES SHOULD BE STRICKEN?

We are basing the categories to be stricken from the clause (2) definition of work for hire on the experience of our members, as documented in our original submission to the Committee. Thus, we would strike "as a contribution to a collective work", "or other audiovisual work", "as a supplementary work", and "as an instructional text". In each of these categories, the creator would be the author for copyright purposes.

We would move the definitions of "supplementary work" and "instructional text" that appear in clause (2) into their appropriate places in the main body of definitions in Section 101 (so that "supplementary work" appears between "State" and "transfer of copyright ownership" and "instructional text" appears between "including" and "joint work").

As a matter of clarification, we would also want to limit the meaning of the term "atlas" by defining it in the definitional section as follows: "An 'atlas' is a bound collection of maps." Otherwise, atlas can have a broader meaning and might include a collection of pictorial representations of any subject - such as an atlas of the parts of the human body.

E. APPROACHING AN IDEAL SOLUTION

Striking certain categories from the clause (2) definition can only be a first step, since neither creator nor publisher would be satisfied by such a result. The creator would simply face "all rights" contracts in every category which had previously

been work for hire. At the same time, the publishers would face a 35-year termination right retained by creators that might interfere with exploitation of projects in which the publishers would reasonably expect to have a long-term interest because such projects were very expensive to nurture or involve input from many different sources (such as encyclopedias in the former case and some specialized textbooks in the latter). An ideal solution to this tension would be to have the creator retain all the rights which the publisher did not in fact use - and also to insure that the creator is compensated for any uses by the publisher beyond those originally understood between the parties when they negotiated the consideration in their contract.

This ideal solution can be approached from a variety of directions. First, it is significant to go back to the earlier part of the copyright revision process. In the 1964 Preliminary Draft for the revision of the copyright law, work for hire would not have included works prepared on commission. Moreover, under the termination provisions, any transfer except employee's work for hire would have been terminable within 25 years (or 20 years in the case of an unjust enrichment). The wisdom of the concerns reflected by these proposals is borne out by our experience since the inception of the new law.

Another approach is to adopt certain presumptions as to what the parties intended, such as those already present in Section 201(c) with respect to contributions to collective works when no express transfer has been made. Such presumptions follow what might reasonably be implied to be the needs of the respective parties.

It has been suggested that requiring the enumeration of all rights being acquired - with separate consideration for each right - would be of benefit in cases in which small independent works are being acquired to be used in larger works. This could

be joined with a principle of unconscionability much like that in the 1964 Preliminary Draft that might look to the size of the consideration in relation to the rights acquired in order to permit the reformation of certain contracts.

Finally, the concept of limiting the commissioning party's exclusive license to reasonably contemplated uses at the time of entering into the agreement could also be manifested in a system which caused unexercised rights to either revert to the creator or become nonexclusive after a certain period of time.

What was never contemplated was that publishers should be positioned to receive windfalls by the acquisition of rights that they did not contemplate using at the time payment for commissioned work was agreed upon.

F. THE PROPOSED AMENDMENT

Our approach fuses many of the foregoing concepts based on our experience with commissioned work for hire in the five years since the copyright law took effect.

First, we would expand the presumptions of Section 201(c) to cover other situations in which a larger work is made from many different contributions. We would then impose certain restrictions and guidelines on what may be done in transactions regarding such contributions. Finally, we would add termination provisions to deal with certain needs of the publishers regarding these categories of commissioned works.

Our version of Section 201(c) would read as follows:

(c) Contributions to Collective Works, Contributions to Compilations, Supplementary Works, Instructional Texts, and Parts of Audiovisual Works.-- Copyright in each separate contribution to a collective work, each separate

contribution to a compilation, in any supplementary work, in any instructional text, and in any part of an audio-visual work, is distinct from the copyright in the collective larger or revised work as a whole, and vests initially with the author of the contribution who created the work to be incorporated into the larger or revised work. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective larger or revised work is presumed to have acquired only the privilege of reproducing and distributing the contribution author's work as part of that particular collective larger or revised work, any revision of that collective larger or revised work, and any later collective larger or revised work in the same series. If an express transfer is made with respect to an author's work in one of the categories covered hereunder, such transfer shall be in a written instrument specifically enumerating each right being acquired and the consideration paid for that right and shall be signed by both parties. Such enumerated rights shall not exceed the rights which the grantee reasonably anticipates exercising. In the event that any enumerated rights have not been exercised within two years of the first publication by the grantee or its successor in interest with respect to any right acquired, such unexercised rights shall be held by the grantee or its successor in interest as nonexclusive and the author may also transfer such rights on a nonexclusive basis.

To protect the needs of publishers whose works may last for longer than thirty-five years, Section 201(c) might continue:

A transfer by an author in one of the categories covered hereunder shall not be terminable by the author pursuant to Section 203(a)(3) if a written contract signed by both parties prior to the commencement of work specifically enumerates certain rights which may not be so terminated.

G. UNCONSCIONABLE TRANSFERS

This new statutory pattern would greatly aid creators while meeting the needs of copyright users. It should be pointed out, however, that even this proposal has some drawbacks for creators. The most noticeable is the fact that publishers can use work forever and pay only one fee - if certain conditions are met. For this reason, which stems from the general inability of the creator to negotiate on a value for value basis, we would suggest that the concept of unconscionability be added to the statute. Such a concept was present in Section 16 (Alternative B) with respect to unremunerative transfers in the 1964 Preliminary Draft. We would suggest that such a remedial concept be added as a new subdivision (f) for Section 201. It would read as follows: "(f) Unconscionable transfers. An author may, at any time following the transfer of a copyright or of any rights under it, bring suit to reform or terminate a transfer in which the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the authors or his successors. In such action the plaintiff shall have the burden of proving that, taking into consideration all factors including the bargaining position of the parties, their respective contributions to the success of the work, and changes in business practices or media exploitation, the terms of the transfer have proved to be unfair or grossly disadvantageous to the author. The court shall decide the action in accordance with the principles of equity, and shall have discretion to reform or terminate the transfer on whatever terms it considers just and reasonable."

V. CONCLUSION

Our proposals would, we believe, permit our members and creators generally to bargain on what will more closely approximate a value for value basis. At the same time, these proposals will

permit publishers to purchase the usage in creative works that they need.

We are most appreciative for the opportunity to make this Supplemental Submission to the Judiciary Committee and hope that it will be of assistance in considering S.2044 and the effect of work for hire on our nation's creative free lancers.

APPENDIX A

SECTION 101 - excerpt giving work-for-hire definition

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 USC 201.

§ 201. Ownership of copyright

(a) **INITIAL OWNERSHIP.**—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) **WORKS MADE FOR HIRE.**—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) **CONTRIBUTIONS TO COLLECTIVE WORKS.**—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) **TRANSFER OF OWNERSHIP.**—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) **INVOLUNTARY TRANSFER.**—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

17 USC 202.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

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Senator MATHIAS. Our next panel will be composed of Mr. Townsend Hoopes, president, Association of American Publishers; Mr. Gabe Perle, vice president, Time, Inc. Mr. Secretary, do you want to open this panel?

Mr. HOOPES. Thank you, Senator Mathias, I would be glad to.

STATEMENTS OF A PANEL CONSISTING OF TOWNSEND HOOPES, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS, ACCOMPANIED BY CHARLES BUTTS, FIRM OF HOUGHTON MIFFLIN; JOHN ROBLING, ENCYCLOPAEDIA BRITANNICA; JON BAUMGARTEN, COPYRIGHT COUNSEL; AND E. GABRIEL PERLE, VICE PRESIDENT, TIME, INC., ACCOMPANIED BY BARRY AGDERN, CHAIRMAN, COPYRIGHT SUBCOMMITTEE, LEGAL AFFAIRS COMMITTEE; ALFRED H. WASSESTROM, FORMER CHAIRMAN, LEGAL AFFAIRS COMMITTEE, MAGAZINE PUBLISHERS ASSOCIATION

Mr. HOOPES. My name is Townsend Hoopes. I am the president of the Association of American Publishers. I am accompanied this morning by Charles Butts of Houghton Mifflin, John Robling of the Encyclopaedia Britannica, and Jon Baumgarten, who is our copyright counsel.

I will briefly summarize my written statement, Mr. Chairman, which I hope will be produced in the record.

Senator MATHIAS. Let me say for the benefit of all succeeding witnesses that the statements will appear in full in the record. You can brief them, summarize them for your oral testimony.

Mr. HOOPES. We welcome the opportunity to express our views on S. 2044 relating to works made for hire. As to books, S. 2044 applies essentially to reference works like encyclopedias and to instructional texts—mainly for elementary and high schools. It appears to us that this bill is based on a faulty premise.

In his statement accompanying introduction of the bill, Senator Cochran stated that it would "protect the author's copyright in the works described, except where express agreement is made to do so otherwise." But examination of the 1976 Copyright Act clearly shows that this desirable safeguard is already present in that law. Section 101, clause (2), the clause that would be amended by the Cochran bill, now states that commissioned and collective works can qualify as "works made for hire" only "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Section 201(b) of the Copyright Act provides further that, in the case of a work established as "made for hire" by reason of agreement between the parties, the publisher and the author may expressly agree upon the allocation of rights between them.

In sum, we believe that the Cochran bill is based on the mistaken assumption that the Copyright Act automatically divests authors of commissioned works of their rights. This is not the case.

It should be noted that the 1976 Copyright Act represents in this regard a change in favor of the author. Under the earlier law, copyright in commissioned works was generally presumed to reside automatically and totally in the publisher. Publishers agreed to changes in 1976 as part of a carefully balanced compromise between author rights and interests and basic business needs.

In drafting section 101(2) of the work for hire provisions, Congress considered the practical problems involved in publishing certain categories of works. As to book publishers, this means essentially encyclopedias or other reference works and instructional texts—mainly for elementary and high schools. The typical encyclopedia is composed of contributions from literally thousands of individual authors. No encyclopedia publisher can employ all of the experts in the variety of fields necessary to produce a quality work. Instead, each contributor is commissioned—in the terms of the act, hired—for a specific task by the publisher, who also assumes all the risks of the venture. The publisher applies his creative talents to direct, coordinate, and merge all of these efforts into a single work that will serve the anticipated needs of the public. In addition, encyclopedias are periodically revised after the first publication.

Similar considerations apply to the publication of instructional texts. Here, the educational publisher commissions—that is hires—a carefully selected team of authors, usually professional teachers, to contribute to the preparation of the work. Then he supervises the planning, creation, and marketing of those materials. It is inherently difficult to look at the final product and isolate a particular author's original contribution. But in the absence of a single identifiable copyright owner of the whole work, the process of revision and the ability to adapt or license particular versions and uses—for example, abridgements or foreign language editions—would be severely inhibited. If segments of larger interwoven units were subject to myriad terminations of the publisher's rights, that would create a totally unworkable situation.

These concerns I speak of are not parochial, nor limited to the financial fate of particular publishers. They extend to the publishing community's basic ability to meet the public needs for reference and instructional works. They are also related to the problem of maintaining the economic incentive for publishers and related entrepreneurs to produce important and socially useful collective works.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Secretary. Mr. Perle?

Mr. PERLE. Mr. Mathias, thank you for giving me this opportunity to talk to you and for the record.

My name is E. Gabriel Perle. I am submitting this statement on behalf of the Magazine Publishers Association.

I have prepared and submitted for the record a written statement, which I shall not read because in 5 minutes I think I can be more effective in responding to some of the things that I heard this morning.

I feel a sense, as I said in my statement, of déjà vu about this. For 20 long years there was a copyright law revision effort. A good part of that effort was devoted to work made for hire. At that time it was called employee for hire. I might add that there is nothing in the statute today which uses the word employee. We did get that out of the statute.

In the course of those 20 years, all sides were heard talking about everything. I could talk not for 5 minutes but for hours just

in response to the few things that were said on the first panel this morning.

When I first read the Cochran bill, S. 2044, I was a little mystified. I did not know why certain categories of work that are presently within the definition of part 2 of section 101 were eliminated from work made for hire and then others were not. I think that perhaps Mr. Crawford and Mr. Karp laid my questions to rest this morning. What they want is not a modification of section 101. What they want is a total change between the relationships between publishers and authors. By authors, I mean writers, photographers, and graphic artists.

If that be the case, then let us have a law or a bill which addresses itself to that, and then we can be directly responsive instead of talking about parts of the question.

Let me deal with some of the misstatements that were made this morning.

In the first place, it is an unfortunate fact of life that neophytes do not command in the marketplace what experienced, very desired well-known people command.

Senator MATHIAS. It is something we know in the political world as the incumbent's advantage. Is that right?

Mr. PERLE. Well, it is more than that. It is James Michener, who can get anything he wants from a publisher for the privilege of publishing his work, and it is the unknown author who is willing to give up rights for far less in order to have work published and to get exposure.

What I was bothered about this morning is, speaking for magazine publishers, that magazine publishers were pictured as people who go around willy-nilly grabbing all rights on a work made for hire basis. In the real world, that does not happen. In the real world, magazine publishers are trying to get that sort of material which will be read by their readership, which will command subscribers and command advertisers. And you do not get that by getting bad writers. You get the best writer you can. That puts you in a marketplace where you are bargaining for the best product you can obtain. I submit that magazine publishers rarely use the work made for hire approach. They do not very often need those rights. And they do not need the hassle that is involved in negotiating for more than they need or want.

Most magazine material is not reused. Most printed magazine material is used one time. And that is what magazine publishers usually buy, onetime North American rights, almost invariably. Now, there are lots of times when they do not, and there are reasons for that.

Let me just allude to what has happened between magazines and photographers. We heard mention of the ASMP, the American Society of Magazine Photographers. In the old days, Life magazine was the biggest showcase that any photographer could have. In the old days, Life magazine would buy onetime rights on existing materials. When it assigned a photographer to shoot a story, when it assigned a David Duncan to go to Russia and shoot photographs, when it assigned a John Dominus to go to Africa and take photographs of wild animals, it used to want an employee-for-hire, now work made for hire, relationship to obtain all rights.

Time Inc., Life's publisher, in most cases no longer wants all rights in all photos shot on assignment. It no longer in most cases wants work made for hire relationships. There are several reasons. In the first place, the sheer expense of storing negatives and color transparencies does not warrant that sort of relationship. Believe it or not, the expense of storing color negatives makes it uneconomical for the publisher to retain all those negatives.

In the second place, there is not that much market for the use of photos taken on assignment but not actually published.

In the third place, photographers who are retained to go on assignment are in many cases photographers to whom the publisher voluntarily returned rights. Indeed, the famous picture of President Roosevelt with the cigarette holder and that marvelous grin on his face was a picture taken by a staff photographer of Life magazine. After he retired, that picture and all his other pictures were given back to him. Now, that is not what I heard this morning. What I heard this morning was that publishers take poor, defenseless people and exploit them. That is not the way it really works.

Senator MATHIAS. Let me ask Secretary Hoopes about the encyclopedia and textbook industry. Are not there instances there where an author's work is clearly identifiable, clearly separable from the rest of the work? In the Britannica the authors are very often assigned their contributions, as I recall. Is it necessary there to require the creative artist of the illustrations or the writers of the articles to sell on a work made for hire basis?

Mr. HOOPES. I would think, Senator, that the answer to the question varies with the particular circumstance. I would be surprised if the makers of encyclopedias used the work for hire form of contract for all of their contributions. Mr. John Robling, who is the vice president of Encyclopaedia Britannica, is here. Perhaps he can respond more specifically with regard to that company.

Senator MATHIAS. And about encyclopedias generally.

Mr. ROBLING. I think that what Mr. Hoopes has said is pretty accurate. I do not want to get too specific, but I have been through this rather recently because we have just published a new edition, the 15th edition, of Britannica. That involved 10 or 12 years of expenses totaling \$32 million, ending up with 43 million words. Now, when we had 5,000 contributors, authors, worldwide, and we might invite a biophysicist from Oxford to do a particular piece, then we would invite someone in the humanities in Tokyo to do a piece, those were all acquired on a basis of a contribution that could be used and reused again, as we go back to press for a new copyright every year. And that is basically the process that we follow.

Many of these are scholars, of course. They come from academia. They are not exactly best-selling authors, but they are experts in their field.

Senator MATHIAS. How about textbooks?

Mr. HOOPES. Again, I think the situation with textbooks varies. In the case of college texts, it is more frequently the case that there are identifiable single or groups authors. In the case of elementary textbooks—and here we are usually talking not of individual texts but of whole programs, for example, multiple volumes on the social sciences, or mathematics for the fifth grade. In such

cases, it is the usual practice to use the work for hire format. The work is far more integrated and is much less the product of an individual author.

Senator MATHIAS. What would you say to Ms. Brickman about her experience today, where she sold an illustration for a rather modest sum of \$75 and then finds it on the dust jacket in a much more prominent position than had been anticipated?

Mr. PERLE. I think I would say to her what was said to the man who asked, "How do I get to Carnegie Hall?" And the answer was "practice." I would say—

Senator MATHIAS. Let's have no demonstrations at this hearing.

Mr. PERLE. I would say that Ms. Brickman was retained, she got work. She did not have to accept that work. She chose to accept that work.

One of the great fallacies about work made for hire is, and as it has been talked about this morning, that there is some sort of magic by which poof, it's material specially commissioned to be work made for hire and that's the end of the contractual negotiation. The contractual negotiation also involves how much you are going to pay, in what installments, and under what circumstances. What controls does each party exercise? Work made for hire is merely a statement of a legal consequence, not of an economic relationship.

So, Ms. Brickman, as her reputation increases, as she gets better known by virtue of being published, will be in a better position to bargain for more money and to bargain for greater rights.

Senator MATHIAS. You would tell her to take that dust jacket then on her next bargaining session and use that as evidence of the fact that she has a marketable talent?

Mr. PERLE. If I were representing Ms. Brickman—and I am sure that some lawyer will be or has been or some agent was or is representing Ms. Brickman—I would say to the publisher: fine, pay us the \$2,000; but, if any of the illustrations Ms. Brickman executes is used as a dust jacket, we desire and insist upon that additional payment which is normal and customary for commissioned dust jackets.

It is a question of how the negotiation works out all the terms and conditions of the contract; agreement that work product is to be work made for hire is merely one of those terms.

Senator MATHIAS. You described the practice at Time-Life. You are interested, by and large, in the one-shot publication.

Mr. PERLE. In the magazines, yes.

Senator MATHIAS. In the magazines.

Mr. PERLE. By and large, not always.

Senator MATHIAS. I understand. But by and large, your normal practice is to pay for the use in one issue of a magazine.

That being the case—and I suspect that is representative of the magazine industry—why would a publisher want to acquire more than that one publication right? Why do publishers acquire more?

Mr. PERLE. There is one instance given in my prepared testimony, which I think reads better than I could tell it now, in the special case where a publisher is creating a story that would not otherwise exist, and at great cost and expense to the publisher. Let me give you a specific example.

At the time of the coronation of Queen Elizabeth, Life magazine sent a host of people over to Westminster Abbey, who did things with cameras that had never been done before. Remote control cameras in the ceiling and all sorts of lighting effects. Life sent a battery of photographers and writers, some of whom were on staff, some of whom were not on staff, to cover that historic event. The cost of that coverage ran into the hundreds of thousands of dollars. At that time, those people who were not staff photographers and writers were on a work-made-for-hire basis because, with Life's investment of hundreds of thousands of dollars, which at that time was an enormous amount of money, Life knew and planned that there would be reuse factors. The publisher knew it would want to use the pictures and words again, although at the time not sure in what context such reuse would occur.

The people that were sent to do that job, to execute something that the publisher was creating—a photo story of the coronation—never would have gone were it not for the publisher. They would not have been in Westminster Abbey. They would not have had the equipment. They would not even have had the film. They were more than happy to go on that assignment and go on a work-made-for-hire basis. Nor were they unhappy at the arrangement. Freelancers worked on the same copyright basis as staff members and the publisher paid the free lancers their market price at that time for the assignment.

Senator MATHIAS. That is, as you say, a rather unique situation.

Tell us, any one of you, is it not also the case that, unless there is some vigorous opposition by the author or the artist, that the publisher, by acquiring all the rights, sets up the possibility of a windfall somewhere down the road?

Mr. HOOPES. Theoretically you are correct, Senator. But I come back to this point: Categorizing a work as a "work made for hire" does not automatically determine the question of compensation, either of amount or of kind. First the work has to be agreed between the parties as a "work made for hire." Second, in accordance with section 201 there may be an allocation of the various rights as between the parties by further express agreement. So, the terms of a "work for hire" agreement are ultimately resolved by the relative bargaining powers of the two parties.

Senator MATHIAS. Of course, then I think you revert to probably the incentive for the introduction of this bill, that the bargaining powers of the two parties are so unequal.

Mr. HOOPES. In some cases they are unequal. But as Mr. Perle has suggested, this is not always the case. It is certainly not the case, for example, where distinguished scholars are asked to provide a major contribution to a new encyclopedia.

Senator MATHIAS. No, or somebody in the position of John Kenneth Galbraith, who is, I expect, well able to protect his flank in a negotiation of that kind. But it is the nurturing of new talent and new creativity that I think we also have an interest in.

Mr. PERLE. Senator, may I comment on new talent. New, unknown talent is not often retained by magazine publishers. As I said before, magazines tend to use established authors who are known in their respective fields. The unestablished author who executes material other than pursuant to a commission or assign-

ment works in his or her garret and submits material, unsolicited, over the transom, in person or through an agent. Such material by its very nature, because it is already in existence and not executed pursuant to a commission with the written understanding that it will be deemed to be work made for hire, if not capable of being work made for hire under the present statute. So the statute needs no revision to take care of that situation.

The new and unknown artist, photographer, or writer wants his work to be published. His principal motivation is to be published, to get exposure to develop a reputation and to demonstrate his art to the public. He also wants to be paid. He is not unlike an unknown actor who is delighted to have the opportunity to act even though not paid as much as a star. It is publication and exposure which develops reputation and reputation in turn increases bargaining power. I submit the work-made-for-hire question is not really relevant in the determination of whether or not an unknown author is to be published in a magazine.

Incidentally, may I correct one omission? I am accompanied here today by Barry Agdern, who is chairman of the Copyright Subcommittee of MPA's Legal Affairs Committee, and Alfred H. Wassestrom who is one of the grand men in the copyright field and the former chairman of MPA's Legal Affairs Committee.

Senator MATHIAS. We are delighted to have all of you here. Thank you very much for being here. Thank you for your testimony.

Without objection, the prepared statements will be inserted into the record.

[Material referred to follows:]

STATEMENT OF E. GABRIEL PERLE, ESQ.
ON BEHALF OF
MAGAZINE PUBLISHERS ASSOCIATION

My name is E. Gabriel Perle. I am submitting this statement on behalf of the Magazine Publishers Association.

The Magazine Publishers Association is an organization representing the interests of nearly 200 publishing firms which publish consumer oriented periodicals. Time, Better Homes and Gardens, Reader's Digest, and Good Housekeeping are among the more widely circulated magazines, but hundreds of other periodicals appealing to a wide variety of interests and avocations are MPA members. The Atlantic, Harper's, Foreign Affairs, Bon Appetit, Essence, Fly Fisherman, Scientific American, Colonial Homes and The New Yorker are among MPA's nearly 800 member magazines. Circulation of member magazines now exceeds 290 million copies per issue.

I am accompanied today by Barry Agdern, Chairman of the Copyright Subcommittee of MPA's Legal Affairs Committee, who is in charge of copyright matters for the Office of the General Counsel of The Hearst Corporation.

Also present with me is Alfred H. Wasserstrom, one of the grand men of the copyright field, who had served for many years as Chairman of MPA's Legal Affairs Committee and its predecessor Copyright Committee.

I am at present Corporate Vice President - Law of Time Incorporated with surveillance over all legal matters of Time Inc. and its subsidiaries, including copyright matters. Time Inc. is the publisher of Time, Life, Fortune, Sports Illustrated, People, Money and Discover magazines. Its book publishing activities include Time-Life Books, Little, Brown and Company and Book-of-the-Month Club. Its video operations include Home Box Office, the country's largest pay television programming

supplier and American Television & Communications Corporation, one of the largest cable television operators in the country.

I have been intimately concerned with and active in copyright matters for many years. President Ford appointed me a member of the National Commission on New Technological Uses of Copyrighted Works (known as CONTU) which was created by Congress in 1974 as part of the effort to revise comprehensively our copyright laws. I have served as president and am presently an honorary trustee of The Copyright Society of the U.S.A. I have served as chairman of the Copyright Division of the Patent, Trademark and Copyright Section of the American Bar Association as well as chairing many committees of that Section. I am on the advisory board of several publications concerned with copyright and intellectual property and I am a member of the Advisory Committee for Copyright Office affairs. I am also a member of the Board of Directors and of the Executive Committee of the American Arbitration Association.

MPA is categorically opposed to S. 2044. That bill represents an unwarranted interference with the literary marketplace and the right of the parties to bargain freely within that marketplace. And it is an unnecessary effort to correct a non-existent problem.

There is a sense of deja vu in the proceedings today. For almost a generation prior to 1976, copyright experts carefully studied, comprehensively discussed and thoroughly debated all sides of all copyright issues as part of the Copyright Law Revision effort. Work made for hire was specifically the subject of a great deal of debate and testimony before the Register, in the Senate and in the House. It was also thoroughly investigated by the Panel of Consultants to the then Register of Copyrights, Abraham L. Kamenstein, on which Panel Mr. Wasserstrom, Irwin Karp and I were all privileged to serve.

The work made for hire provisions of the Copyright Law Revision bill, according to Senate Report No. 94-473, at page 104, represented a "carefully balanced compromise." The statutory definition of work made for hire was carefully constructed in order to deal with and reconcile the respective interests of contributors and publishers. Indeed on page 105 of Senate Report No. 94-473, the statement was made that:

"The status of works prepared on special order or commission was a major issue in the development of the definition of 'works made for hire' in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances." [Emphasis supplied]

The work made for hire provisions adopted after all this effort have been in effect for fewer than five years. Neither the MPA nor this witness is aware of any development or occurrence since January 1, 1978, when the new law went into effect, that justifies any change whatever in the work made for hire provisions of the law and the carefully balanced compromise they represent.

Other provisions of the Copyright Act were drafted to be in harmony with the very definitions which S. 2044 would drastically change. A magazine is, according to the definition in Section 101, a "collective work." Under Clause 2 of the definition of "work made for hire" in Section 101, a collective work is one category of work which, if specially ordered or commissioned, can be under certain circumstances a work made for hire. Section 201 then deals, among other things, with the respective rights of the parties to a work made for hire agreement. Section 201(a) provides that copyright vests initially in the author of the work. Section 201(b) provides that, in the case of a work made for hire, the employer or other person for whom

the work was prepared is considered the author for purposes of copyright and owns all of the rights comprised in the copyright unless the parties have expressly agreed otherwise in a written instrument signed by them. Section 201(c) then provides that copyright in each separate contribution to a collective work is distinct from copyright in a collective work and vests initially in the author of a contribution. Since the persons for whom the work was prepared--the magazine publisher--is the "author" under Section 201(b), all that Section 201(c) does is confirm that the publisher is the owner of the contribution. It is evident that the Section 101 definition of work made for hire and the provisions of Section 201, are totally compatible and "in line" with each other.

The statutory provisions for work made for hire in the 1976 Copyright Law are incapable of becoming a mechanism for oppressing individual contributors. The very definition in Clause 2 of Section 101 grants substantial safeguards to the individual contributor: first, only the enumerated categories of material can be work made for hire; second, the work must be "specially ordered or commissioned for use as a contribution...;" and third, the parties must "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." Parenthetically it should be noted that this solicitude shown for the contributor in the Copyright Act is even greater than that provided by the Statute of Frauds. The Statute of Frauds requires that an instrument be signed only by the party to be charged. The Copyright Act requires that both parties sign in order to evidence their mutual intent that work specially ordered or commissioned be work made for hire.

S. 2044, running willy-nilly over existing statutory provisions without any good cause shown, would preclude magazine publishers from ever, under any circumstances,

specially ordering or commissioning any article.

Let me put work made for hire in the magazine field in context. Let us suppose that a magazine publisher wishes to have a particular writer "cover" the wedding of Prince Charles and Lady Diana. The publisher knows that he wishes to publish the article at the time of the wedding and republish it on the 50th Anniversary of the wedding. He also knows that he may desire to republish the article in a special issue of his magazine devoted to newsworthy weddings over the years. The publisher can retain that writer to write the piece, agreeing with the writer that there be conveyed to the publisher sufficient rights to enable him to fulfill his publishing plan, at a mutually agreed upon price. But the publisher cannot be assured of the right to utilize the article on the 50th Anniversary of the wedding because the writer or his or her representatives may terminate the grant of rights under Section 203(a) of the Copyright Act prior to the 50th Anniversary. The only way the publisher can be assured of obtaining the rights he needs in the article which he is specially ordering or commissioning is on a work made for hire basis. So publisher and writer may, under the present law, bargain on that basis. If S. 2044 were to be enacted, there would not be any way the publisher could be sure he could lawfully republish fifty years later.

It is not accurate to say that an author is in a weak bargaining position vis-a-vis the magazine publisher who might commission the work. The writers assigned or commissioned to write articles for recognized magazines are almost invariably part of a comparatively small group of well-known freelancers who have and exercise bargaining power on an equal level with that of the editor or publisher. The writer demands and receives his quid pro quo. Where

the agreement is on a work made for hire basis, the writer, photographer or artist demands and receives what he or she regards as adequate compensation or he or she refuses the assignment and turns his or her talents elsewhere.

Some people have advanced the fatuous argument that the use of the phrase "work made for hire" turns the freelance writer into a "hireling" and therefore the very use of that phrase is repugnant. Of course the use of the phrase "work made for hire" does not make the writer a "hireling" or employee. Clause 2 of the definition of work made for hire clearly applies to an independent contractor situation. Irwin Karp, Esq. speaking for the Authors League of America, during a 1963 meeting held by the Register of Copyrights in connection with a preliminary draft of a revised copyright law, acknowledged this in saying:

"It just doesn't make a particle of difference, in the case of a work written on commission, whether you call a man an employee for hire or not. You can always get an assignment of his rights if you are actually paying him a lump sum. You can take them away from him; they do it right now. Your problem is whether he is going to get them back after twenty-five years under a reversion clause. I think that the semantics of "on commission," of 'works made for hire,' and so forth aren't really the issue. The issue is reversion." Copyright Revision Part 3 Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, September, 1964, P. 262,263.

Indeed reversion is the issue. An analysis of works made for hire as they relate to magazines reveals that the sine qua non of a work made for hire is that it would not have been created except for the individual or entity which commissioned that work. As opposed to a work created by an individual who chooses to create as a result of either an artistic need to create, or an expectation of profit based upon what the individual believes may have commercial value, work made for hire will be created only to fill the needs of a specific employer or market. The compensation

for the individual's efforts and expenses will be fixed and agreed to in advance. Thus it is only fair that the party who conceived of the need for a specific work, who commissioned the work, who assumed the entire entrepreneurial risk in connection with that work, and who removed any economic risk on the part of the contributor should be allowed to own what he has caused to come into being and, indeed, to own what he and the contributor mutually agreed that he, the commissioning party, should own.

In closing, may I respectfully submit that the Copyright Law is a well-designed, well-engineered and well-working instrument. It achieved a balance between the interests of many parties with conflicting interests and, at least in the field of relations between writer and publisher, it works. The carefully balanced compromise provided with respect to work made for hire should not be altered or changed unless there is compelling evidence that the Law is somehow inequitable or wrong. I repeat that, to the best knowledge of MPA and this witness, there is no such evidence.

As a homespun philosopher once remarked, "If it ain't busted, don't fix it."

E. Gabriel Perle

Summary of the Statement of
E. Gabriel Perle on Behalf of
The Magazine Publishers Association
Before the Senate Committee on the Judiciary
on S. 2044
October 1, 1982

The Magazine Publishers Association is opposed to S. 2044.

- The provisions of the Copyright Act of 1976 regarding work made for hire were the product of years of study, consultation and debate. Those provisions carefully balance and reconcile the respective interests of the parties to work made for hire relationships.
- The present law provides ample safeguards which protect writers, photographers and artists who contribute to magazines from being dealt with unfairly.
- Nothing has occurred since the effectiveness of the Copyright Act of 1976 which justifies any change in the work made for hire provisions of that law.
- S. 2044 would constitute an unwarranted interference with the literary marketplace and the right of parties to bargain freely within that marketplace.
- S. 2044 is an unnecessary effort to correct a non-existent problem.

STATEMENT OF THE
ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Before The
SENATE COMMITTEE ON THE JUDICIARY

On
S. 2044

October 1, 1982

The Association of American Publishers, Inc. ("AAP") is pleased to accept the invitation of the Committee to express its views on S. 2044, as introduced by Senator Cochran on February 22, 1982. The AAP is the trade association of United States book publishers and (together with its predecessor organizations) represented the American book publishing industry during the long and delicate process of copyright law revision and implementation of the new Copyright Act.

The AAP membership includes publishers of all types of books; of particular pertinence to the matter before you today, it includes principal publishers of our country's "instructional texts" and "collective works" (such as encyclopedias and dictionaries). From the AAP's point of view, the major impact of S. 2044 would be to remove these two types of books from eligibility for treatment, with the individual author's* agreement, as "works made for hire" under the 1976 Copyright Act. We emphasize the phrase "with the individual author's agreement" quite purposefully, for it appears to us that S. 2044 is based on a faulty premise.

*"Individual author," as used herein, includes artists, photographers, and others, as well as writers of text.

A. The Stated Objectives of S. 2044 Are Met
By the Existing Copyright Act

In his statement accompanying the introduction of S. 2044 (Cong. Rec. February 2, 1982 at S. 292), Senator Cochran stated that this bill:

"would protect the author's copyright in the works described, except where express agreement is made to do so otherwise . . ." [Emphasis added]

However, consideration of the 1976 Copyright Act clearly shows that this safeguard for the individual author's interest is already present in the law. Thus, clause (2) of the definition of "works made for hire" in section 101 of the Act -- the clause that would be amended by the bill -- states that commissioned instructional texts and contributions to collective works can only qualify as "works made for hire":

"if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." [Emphasis added]

Moreover, the existing Copyright Act further assures the objectives of S. 2044 by providing that, even where a commissioned work is considered to be "made for hire" by agreement, the commissioning publisher and individual author may expressly agree as to the ownership and allocation of rights among them (Sec. 201(b)).*

In sum, we believe that S. 2044 is based on the mistaken assumption that the Copyright Act somehow automatically divests

*Additional safeguards for the interests of individual authors are noted in ¶D, below.

the individual authors of commissioned works of their rights. As we have shown, however, that is not the case. The Act now provides that the individual author's copyright in a commissioned work is wholly preserved unless the author expressly agrees, in writing, that the work shall be considered as one made for hire; and, even if the author does so agree, he or she may still reserve all or some of his or her rights by written agreement.

It may also be noted that the 1976 Act represents a fundamental change in our copyright law. Under the law in effect prior to January 1, 1978 (the effective date of the 1976 revision), copyright in commissioned works was generally presumed to reside automatically in the publisher or other commissioning party.* Publishers agreed to the changes effected in clause (2) of section 101 as part of a thoroughly reviewed compromise that takes into account effects and business needs going beyond the labels and definitions of section 101.** Again, then, the change in law that we understand to be the objective of S. 2044 has already been accomplished and is reflected in the current Copyright Act.

B. The Effects of "Works Made For Hire"

For present purposes, the principal effects of a commissioned work being considered to be "made for hire" are:

*See, e.g., Nimmer, Copyright §5.03[B] at 5-21; Angel & Tannenbaum, Works Made For Hire Under S. 22, 22 N.Y.L.S.L. Rev. 209, 228-229 (1976).

**See, generally, Angel & Tannenbaum, supra and ¶B. and C. below. As this Committee noted in its Report on the 1976 Act: "The work-made-for hire provisions of this bill represent a carefully balanced compromise" S. Rep. No. 94-473, 94th Cong., 1st Sess. at 104, 105 (1975); accord, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 121 (1976).

- The commissioning party is deemed to own "all of the rights comprised in the copyright" (sec. 201(b)). As noted above, however, this will occur only if the individual author so agrees, in writing (sec. 101); and the individual author who does so agree may, in any event, negotiate an agreement varying this effect in whole or in part (sec. 201(b)).
- The rights acquired by the commissioning party are not subject to statutory termination. Under the new Copyright Act, authors are permitted by law to terminate their agreements with publishers during a period beginning thirty-five years from the date of the contract or from publication (sec. 203). Works that are considered to be "made for hire" are not subject to statutory termination (sec. 203(a)).* Although this exclusion might appear on the surface to be a limitation on the individual author's rights, that conclusion would be wholly superficial because: (a) again, this exclusion cannot apply unless the author of a commissioned work expressly agrees, in writing, that the work should be considered as one made for hire; (b) the termination opportunity is itself an encumbrance upon the general principle that authors and publishers, as well as others, are free to reach agreements (e.g., as to the term of contract) between them; and (c) the particular circumstances of those limited classes

*The law does not preclude a negotiated termination provision in the case of "works made for hire."

of commissioned works -- here, instructional texts and contributions to encyclopedias and like collective works -- that are subject to "work made for hire" treatment (with the individual author's consent) typically render the termination principle inapposite.*

C. Encyclopedias and Instructional Texts

As indicated above, in crafting section 101, clause (2) of the work made for hire provisions of the 1976 Act, Congress considered the particular nature of publishing efforts involved in creating specific categories of works. For present purposes we will briefly describe these considerations as they pertain to encyclopedias** and instructional texts.

The typical encyclopedia is comprised of contributions from literally thousands of individual authors. No encyclopedia publisher can employ all these experts in the variety of fields necessary to produce a quality work. Instead, these many contributors are commissioned -- in the terms of the Act, "hired" for a specific task -- at the instance and inspiration (and risk) of the publisher, and the publisher applies its creative talents to direct, review,

*This was, in fact, recognized by Congress and was a fundamental basis of the compromise that resulted in the current version of the second clause ("commissioned works") of the definition of "works made for hire" in section 101 of the Act. See generally, Angel & Tannenbaum, supra, and ¶C. below.

**Although we will refer to "encyclopedias," similar considerations apply to dictionaries, glossaries, and other reference works of a collective nature.

refine, and merge all of these efforts into discrete sections and a single work that will serve the anticipated needs of the public. In addition, these works are periodically revised after first publication. In some cases, particular portions of the whole may remain the same over long periods of time, extending well beyond the thirty-five year termination period (e.g., a biographical entry for a deceased individual or section on past history); in others, both retention of parts and revision may be necessary (e.g., a section on scientific theory or current geopolitics). In many cases, virtually every paragraph, or sentence, of a single entry will reflect the separate, integrated, contributions -- whether made over many months of review and editing for first publication, or many years of revision -- of numerous authors.

Like considerations apply to the publication of "instructional texts," a category that this Committee has recognized as "one of the most important" classes of commissioned works that may be treated as made for hire.* Commonly, it is the educational publisher who engages in detailed research and determines the need for a particular work or program, analyzes and establishes the outline of materials to be covered, convenes meetings and seminars of educators to solicit their views, commissions -- "hires" -- a carefully selected team of authors (usually professional teachers) to contribute to the preparation of the works, and supervises the

*S. Rep. No. 94-473, 94th Cong., 1st Sess. at 105 (1975); accord, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 121 (1976).

planning and creation of the materials. During the preparatory stages, numerous individuals will participate under the publisher's supervision in assigned tasks relating to the submissions, review, revising, and reworking of manuscripts to meet detailed pedagogic and curriculum needs. Indeed, it will often be difficult to look at the final product and isolate a particular author's original contribution. And, after publication, similar processes of periodic, multiple-participant, revision will be necessary to continue meeting the needs of the teaching community.

Finally, considerations combining those just discussed for both encyclopedias and instructional texts apply to single textbooks comprised of commissioned chapters by particular specialists.

In these contexts, distinctions between staff employees and commissioned authors are, for purposes of the Copyright Act, illusory. In the absence of a single, identifiable copyright owner of the whole and its constituent parts, the processes of revision and updating would be severely inhibited, and the ability to adapt or license particular versions and uses (e.g., abridgements, special adaptations, foreign language editions, and -- of increasing importance -- microform, videoform, data base, and electronic media versions) would be significantly impaired. And subjecting discrete segments of larger interwoven units (whether paragraphs of particular entries or sections of the entire work) to myriad terminations of the publisher's rights would be virtually intolerable.

These concerns are not parochial, limited to the financial fate of particular publishers. They are important elements of the publishing community's ability to meet the needs of the general, special, and educational publics for reference and instructional works: to create comprehensive, accurate, and up-to-date materials; to disseminate these materials in rapidly changing fashions that will adequately and effectively serve their purpose; and to maintain the economic incentive to continued creative effort that underlies our copyright laws.

D. "Abuses" Of Work Made For Hire?

Since the new Copyright Act came into effect in 1978, there have been occasional unsubstantiated rumblings of "abuses" of the work made for hire provisions (a perjorative, by the way, that hardly pertains to the offering or negotiation of contracts or terms called for by legitimate business considerations). However, we are aware of no circumstances under which the rights of individual authors are being deliberately or systematically abused or disregarded by our members. Additionally, and at the risk of repetition in part, we must point out that the revised Copyright Act already contains several safeguards for the author's interests in this connection:

- by requiring an "express agreement" that a commissioned work "be considered a work made for hire" as a condition to work made for hire treatment;
- by requiring that such an agreement be "written" and "signed" by the parties;

- by permitting such treatment only for non-employee works that have been "specially ordered or commissioned," thus assuming some motivating, generating, initiating, or like relationship of the publisher to the work;
- by permitting commissioning parties and individual authors to agree as to the ownership and allocation of rights among them, even if the work is to be considered as "made for hire" by mutual consent; and
- by limiting the possibility of "work made for hire" treatment to specified categories of commissioned works.

G. Conclusion

The "work made for hire" provisions of Section 101, clause (2) of the 1976 Copyright Act (particularly as it pertains to instructional texts and contributions to encyclopedias and other collective works) provides full safeguards for the interests of individual authors. At the same time, it permits the orderly and efficient development, revision, administration, and marketing of particular works and rights therein. Thus, it equally serves the interests of the public in the vitality and richness of American publishing. If there are particular situations in which the pertinent provisions have caused legitimate difficulties for authors, these are isolated instances that may call for discussion; they do not call for blanket, legislative revision of the balanced, workable, and fair resolution that is now represented in the Copyright Act.

Thank you for the opportunity to present our views.

Senator MATHIAS. Our third panel today is composed of Mr. Elmer Bernstein of the Screen Composers of America and Mr. Richard Colby, senior distribution and marketing counsel for Twentieth Century Fox Pictures.

STATEMENTS OF A PANEL CONSISTING OF ELMER BERNSTEIN, SCREEN COMPOSERS OF AMERICA, AND RICHARD COLBY, SENIOR DISTRIBUTION AND MARKETING COUNSEL, TWENTIETH CENTURY-FOX PICTURES

Mr. BERNSTEIN. Senator Mathias, I would like to make a personal observation to begin with. I am very thrilled to find the highest law-making body in the land considering the plight of creative artists.

I would like to start by thanking Senator Cochran for his concern and you, Senator Mathias, and the Judiciary Committee for the opportunity to speak on these issues.

Senator MATHIAS. Your thanks really ought to go to the Founding Fathers. They embodied concern for protecting the creativity of authors and inventors by providing for copyright and patent in the Constitution. So, that is where our continuing appreciation should lodge.

Mr. BERNSTEIN. It is thrilling to find it works.

I am here representing the Screen Composers Association of America. I am really substituting for its president, Herschel Gilbert, who could not be here today. I am in rehearsal in a show in New York City, and I am speaking extemporaneously.

I am representing composers who write music for the film medium primarily. We have a slightly different situation, because of the nature of music itself. Music is an art which can have many different kinds of uses. If I may, Senator, I will refer to your calf and cow. A screen composer is in a position of delivering a calf that can also turn into an eagle or a bird.

Senator MATHIAS. A turkey, ever?

Mr. BERNSTEIN. And a turkey, yes, definitely a turkey; we have had many of those.

The music for a film score can become a popular song. It can become a recording. It can be made by the composer into a suite that can be performed by a symphony orchestra. It can be turned into a march which can be played on a football field. It can become an advertisement for cigarettes, beer, underarm deodorant, whatever.

At the present time and for some time past, there is nothing in the relationship, in my opinion, between the composer and the producer which is classically for hire. In effect, the composer is commissioned for a specific work, namely providing a score for a particular motion picture to be synchronized with the motion picture and serve the motion picture for its life. In spite of that, composers are routinely presented with for-hire contracts, the sole purpose of which is to use the for-hire contract for the purpose of acquisition of the copyright and then exploitation of the music in all these other areas that I have indicated. The composer thereby effectively loses all control in any other use of the music in perpetuity.

We have heard a lot of talk, for instance, about the relative bargaining strengths of the people. Now, I must say to this point immodestly that I think I would be considered to be probably one of the top composers in my field. I think it could be said that I command probably the highest fees that are paid to composers today. I have been an Academy Award winner. I have done the music for 140 motion pictures and numerous television shows. Nevertheless, if I take the position that I do not wish to enter into a for-hire arrangement, I would have to consider some other field of work. I would suggest probably the best thing to do would be to become a producer. This is a fact.

Also, I would like to dramatize this relationship by pointing out that on occasions when, through my agent, I have attempted just to test the water, so to speak, to exchange a fee for copyright control, I have never been successful in so doing. It suggests, in effect, in terms of bargaining power, that surely suggests that the copyright which is obtained is obtained at a relatively unfair fee in terms of its worth.

I will stop now, as the red light is on. Thank you very much.

Senator MATHIAS. Thank you very much. Mr. Colby?

Mr. COLBY. My name is Richard Colby. I am a member of the California and New York bars, senior distribution and marketing counsel of Twentieth Century-Fox Film Corp., and formerly chairman of the Copyright Committee of the Motion Picture Association of America.

Although I am not speaking on behalf of the American Bar Association or any of its sections or committees, I presently serve as chairman of the Subcommittee on Works Made For Hire of Committee 307 of the ABA's section of patent, trademark, and copyright law.

I attach to my statement a list of my published writings, including at item 8 my previous testimony at the 1963 hearings at the Copyright Office.

I am authorized to say that the member companies of the Motion Picture Association agree in principle with my statement, but time has not been sufficient for their respective counsel to review it in any detail. To that extent, I have the deep honor to appear by invitation of the Committee on the Judiciary of the U.S. Senate in my individual capacity as a copyright lawyer.

Briefly, the proposed amendment would directly diminish the value of our contracts and would restrict our ability to recoup the capital investment we have at risk in the following respects.

One, by removing commissioned works from the category of works made for hire, the amendment would permit a writer or composer to terminate sequel and remake rights granted to the producer.

Two, the motion picture producer would no longer be deemed the author of all parts of the motion picture, raising questions under foreign laws and treaties as to the nationality of the motion picture, thereby making it more difficult to enforce and protect all of our rights in foreign countries.

Three, the potential revenue from sequels and remakes would, in time, be lost, even if the parties had agreed upon payments and

that such sequel and remake rights were to be owned by the producer.

Four, many people create a motion picture, including writers, the director, cameraman, producer, actors, creators of special effects, and many, many other people. A motion picture is undoubtedly the most complex form of a derivative work developed and formed by many creative talents to transform the written word and music and art into a motion picture at the sole cost and risk of the producer. Why should sequel rights revert to one of the contributors to the production of a motion picture if that person is willing, as and to the extent now permitted by the act, to grant such rights to the producer upon such compensation as may be agreed upon?

Five, as a study of the legislative history of the act will amply demonstrate, all of the foregoing and other problems had been studied by this committee, and the work-made-for-hire provisions of the act were reported out by this committee in November 1975 as "a carefully balanced compromise," and that a change would be "of dubious value to employers and employees alike which might also reopen a number of other issues," and as stated by the Register of Copyrights: "The definition now in section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides."

Most of the legal relationships between artists and producers, employees and employers, in the motion picture industry are governed by short-term collective bargaining agreements, usually improved by the employee with each new agreement, as in 1981 for actors, writers, and directors, with residual payments for use of subsidiary and ancillary rights.

In the absence of any demonstrated need for a change with respect to the motion picture industry, I respectfully suggest that the words "as a part of a motion picture or other audiovisual work" be deleted from the amendment and retained in the act.

In the motion picture industry many, indeed an increasing number, of the talented people who participate in the collective creation of a motion picture are engaged at their request as independent contractors whose services are specially ordered or commissioned, not employed for use as part of a motion picture.

Partially in response to the distinguished Mr. Elmer Bernstein, I would point out that in contracts with composers there are standard provisions that for the use of the music we are to pay additional royalties including that composers receive shares of performance royalties directly through his or her performance rights society.

Tax considerations apply to commissioned works. As I am not a tax specialist, I will only allude to advice passed on to me that, in order to generate additional retirement and pension, health, and welfare benefits, in addition to those available through union and guild plans, composers and others prefer to provide their services through corporations of which they are direct employees. Such employer corporations then lend the services of their employees to a motion picture producer to create a work specially ordered or commissioned as part of a motion picture.

As stated by this committee with reference to the termination of transfer provisions in section 203 of the act, including the clause that excludes works made for hire from its operation, "Section 203

reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and the legitimate needs of all interests involved."

In conclusion, may I emphasize that the act was the result of a legislative process which began with the famous Copyright Office studies of 1955 and culminated 22 years later in the Copyright Act of 1976.

There has been no testimony of any alleged abuses in the motion picture industry.

It is my judgment that any perceived problems are more appropriately the subject of contract negotiations between the parties within the structure of the present act and collective bargaining agreements, where applicable, and do not indicate a legislative problem.

I hope that this statement at least demonstrates that the words "as a part of a motion picture or other audiovisual work" should be retained in present section 101 for a definition of a work specially ordered or commissioned which may qualify as a work made for hire if the parties so agree in writing. Thank you, Senator.

Senator MATHIAS. Thank you, Mr. Colby. Without objection, your prepared statement will be inserted into the record at this point.

[Material referred to follows:]

Memorandum Statement
of
Richard Colby
Senior Distribution & Marketing Counsel
of Twentieth Century-Fox Film Corporation

My name is Richard Colby. I am a member of the California and New York Bars, Senior Distribution & Marketing Counsel of Twentieth Century-Fox Film Corporation, and formerly Chairman of the Copyright Committee of the Motion Picture Association of America, Inc.

Although I am not speaking on behalf of the American Bar Association or any of its Sections or Committees, I presently serve as Chairman of the Subcommittee on Works Made for Hire of Committee 307 of the ABA's Section of Patent, Trademark and Copyright Law.

I attach to this Statement, a list of my published writings, including at item 8. my previous testimony at 1963 Hearings at the Copyright Office, reported at pages 268 and 278-281 of Copyright Law Revision Part 3, a print of the Committee on the Judiciary of the House of Representatives.

I am authorized to say that the member companies of the Motion Picture Association of America agree in principle with my Statement, but time has not been sufficient for their respective counsel to review my Statement in any detail. To that extent, I have the honor to appear by invitation of the Committee on the Judiciary of the United States Senate, in my individual capacity as a copyright lawyer.

S. 2044

The following is a copy of the definition in §101. of the Copyright Act of 1976 ("the Act") of a "work made for hire," in

which brackets are used to indicate the deletions proposed in S. 2044 ("the Amendment"):

A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use [as a contribution to a collective work, as a part of a motion picture or other audiovisual work,] as a translation, as a supplementary work, as a compilation, [as an instructional text,] as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes. [and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.]

SUMMARY

The proposed Amendment would directly diminish the value of our contracts, and would restrict our ability to recoup the capital investment we have at risk, in the following respects:

1. By removing commissioned works from the category of works made for hire, the Amendment would permit the artist to terminate, pursuant to §203. and §304.(c) of the Act, the sequel and remake rights granted to the producer.
2. The motion picture producer would no longer be deemed the "author" of all parts of the motion picture, raising questions under foreign laws and treaties as to the nationality of the motion picture, making it much more difficult to enforce and protect our rights in foreign countries.
3. The potential revenue from sequels and remakes would, in time, be lost, even if the parties had agreed upon payments and

that such sequel and remake rights were to be owned by the producer.

4. Many people create a motion picture, including writers, the director, cameraman, producer, actors, creators of special effects, and many, many other people. Why should sequel rights revert to one of the contributors to the production of a motion picture, if that person is willing, as, and to the extent, now permitted by the Act, to grant such rights to the producer upon such compensation as may be agreed upon, and why should the motion picture producer not have the right to produce and distribute sequels if, in fact, only part of the motion picture resulted from the contribution of that person to the motion picture.

5. As a study of the legislative history of the Act will amply demonstrate, all of the foregoing, and other problems, had been studied by this Committee, and the work made for hire provisions of the Act were reported out by this Committee in November 1975, as "a carefully balanced compromise" [S.R. 94-473 ("S.R.") at 104], that a change would be "of dubious value to employers and employees alike (which) might also reopen a number of other issues" [S.R. at 105], and as stated by the Register of Copyrights [CLR Part 6 at 66]:

The definition now in section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides.

Most of the legal relationships between artists and producers, employees and employers, in the motion picture industry are governed by short-term collective bargaining agreements (usually improved by the employee with each new agreement, as in 1981 for actors, writers and directors), and standard form contracts resulting from such agreements.

In view of the almost unanimous support that the Act had

from all interested parties, including the Register of Copyrights, when it became Law, and in the absence of any demonstrated need for a change with respect to the motion picture industry, I respectfully suggest that the words "as a part of a motion picture or other audiovisual work," be deleted from the Amendment and retained in the Act.

As I expect that others will present all sides, especially the public interest, with respect to other authors, publishers and producers, including the changes the Amendment would work upon contributions to collective works, such as encyclopedias, I will focus my remarks on the impact of the Amendment upon the motion picture industry.

Before I do so directly, it may be appropriate first to analyze the Amendment in relation to several other sections of the Act with respect to what was referred to by this Committee in 1975 as a change

of dubious value to employers and employees alike (which) might also reopen a number of other issues. [S.R. at 105.]

THE AMENDMENT

The Amendment would delete three of nine categories of works which, even though works specially ordered or commissioned, would not qualify for treatment as a "work made for hire," even if the parties were willing so to agree in a written instrument signed by each of them. Among the three works to be excluded are works specially ordered or commissioned for use as part of a motion picture or other audiovisual work.

The consequences of this proposed change would affect, for example:

1. Whether the party who commissions the work is to be considered the author under §201.(b) of the Act, consistent with the

fact that the parties can now allocate the rights arising under the Act, even if the work is deemed to be a work made for hire.

2. The nationality of the work, its qualification for protection under the Act, and under foreign laws and treaties. §104.(b) of the Act.

3. Whether the carefully crafted Termination of Transfers and Licenses provisions of §203. and §304.(c) will apply to the work, since each of these Sections, for reasons to be reviewed below, excludes works made for hire from their operation.

4. Duration of the copyright term under §302. and §304. of the Act.

As stated by this Committee:

The right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the bill. [S.R. at 108.]

Indeed, that:

Section 201.(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. (Emphasis added.) [S.R. at 104.]

As noted by Abraham L. Kaminstein, late Register of Copyrights, in summing up, following the 1965 Hearings before the Committee on the Judiciary of the House of Representatives (really the end of the debate on these topics prior to enactment of the Act in 1976):

Most amazing to those of us closely involved in the development of the bill is what has happened with respect to the so-called "reversion" or termination-of-transfers provision now found in section 203. This, which was once by all odds the most explosively controversial provision in the bill, appears to have largely receded as an issue in general revision.

The one remaining issue on ownership of copyright that should be mentioned here is raised by the proposal advanced on behalf of screen writers and composers which would change

the status of "works made for hire" under both the existing law and the bill, and would substitute the equivalent of the "shop right" concept of the patent law. The concept of an employer for hire as "author" is an important one in the present statute, and in our 1961 report we recommended continuation of the present rule that all rights vest in the employer as the most practical solution to the problem. The proposed "work made for hire" provisions, which are based on this premise, represent a carefully worked-out compromise whose effects are felt throughout the bill. The suggestions for changing them are put forward by authors who have already achieved some of the goals they are seeking in the bill by means of collective bargaining agreements, and on balance I believe that the arguments in favor of their suggestions are substantially outweighed by the practical difficulties they would present. [Hearings on H.R. 4347, Serial No. 8, Part 3, at 1866.]

Parenthetically, we may observe that the "shop right" then suggested by composers was not analogous to the patent laws for, as analyzed in Copyright Office Study No. 13, at page 140, prepared for this Committee, and reprinted, together with thirty-three companion Studies, in 1 Studies on Copyright, Arthur Fisher Memorial Edition (1963) 717, at 732:

It is enlightening to note how the U.S. patent law has worked out in this connection. The patent statute makes no special provision regarding the ownership of patents or inventions made by employees for hire, but the following rules have been developed by the courts in construing employment contracts and applying trade custom. If an employee makes an invention in the course of his general employment or through the use of his employer's facilities, he is entitled to secure the patent, but his employer will have a "shop right" in such patent. This "shop right" is in the nature of an implied nonexclusive license to utilize the patent throughout the term of protection. However, if an employee is hired specifically for the purpose of making a particular invention, or if during his employment he is specifically assigned to work on an invention, the employer is considered to be entitled to ownership of the patent and may compel the employee to assign to him the patent secured by the employee.

At common law, the employer has always been recognized as owning all the aspects of the literary product which he engaged the employee to create. This concept was taken over into the Copyright Act of 1909 by the provision that an employer for hire was to be deemed the author, and have all the rights of an author. The "shop right" suggested by the screen writers and composers in their amendment proposal, upon analogy to the patent laws, is inapplicable. Borge Varmer, of the Copyright Office,

made this clear in Study No. 13 "Works Made for Hire and on Commission" prepared for the Congress (p. 140), reprinted in 1 Studies on Copyright, Arthur Fisher Memorial Edition, 717, at 732 (quoted above).

Thus, the "shop right" does not apply if the employee is hired specifically for the purpose of making a particular invention, or if during his employment he is specifically assigned to work on the invention. On the contrary, the employer owns it in its entirety.

Applying the analogy, there would certainly be no "shop right" where a work has been specially ordered or commissioned, or is prepared by an employee within the scope of his employment.

As Mr. Kaminstein stated in the Register's 1965 Supplementary Report [Yellow Book], Copyright Law Revision Part 6, at 66:

The definition now in section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides.

PRACTICE AND EXPERIENCE

In his statement to the Senate on February 2, 1982 [Congressional Record S. 292], in explanation of S. 2044 ("the Amendment"), the Honorable Senator from Mississippi, Senator Thad Cochran, did not set forth specific reasons why motion pictures and other audiovisual works (collectively hereinafter referred to as "motion pictures") were included in the Amendment, and therefore to be excluded from that part of the present §101. definition of a "work made for hire." The latter now permits a work specially ordered or commissioned for use as a part of a motion picture to be considered a work made for hire if the parties expressly agree, in a written instrument signed by each of them, that it shall be so considered.

The Honorable Senator said in part that:

Such a change in this definition would protect the author's copyright in the works described, except where express agreement is made to do so otherwise, while continuing to cover as a "work made for hire" such minor subsidiary contributions as translations, indexes, maps, etc.

I might add that this amendment also brings the definition for a "work made for hire" in section 101 into line with the provisions in section 201 concerning the copyright ownership of works made for hire and contributions to a collective work. Thus the congressional intent to exclude these items has been expressed previously in section 201.

May I respectfully point out, as is emphasized below, that the Act now provides that, for a work specially ordered or commissioned to be considered a work made for hire, the parties must "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." And, in §201.(b), provision is now made that the parties may allocate and divide "all of the rights comprised in the copyright" between them, if they "have expressly agreed" to do so in a written instrument signed by them.

There is, I respectfully suggest, no inconsistency between the definition of a work made for hire in §101., and the quoted portion of §201.(b). As the legislative history analyzed in this Statement demonstrates, as summarized by this Committee in 1975 in S.R. 94-473 at page 104:

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise.

However, in order to anticipate arguments that may be made by supporters of the Amendment for inclusion of motion pictures in the Amendment, this Statement will, at this point, discuss some of the ways in which contracts and copyright rights are dealt with in the motion picture industry. These practices directly affect the production and distribution of motion pictures, not only in the United States, but in every other country in the world where our motion pictures are exhibited.

A motion picture is perhaps the most complex form of intellectual property. It is developed by and derived from numerous creative talents who all devote their intellectual, creative and practical abilities to the adaptation, indeed the transformation, of the written word and music and art into a motion picture.

Many, indeed an increasing number, of the talented people who participate in the collective creation of a motion picture are engaged at their request as "independent contractors," whose services are "specially ordered or commissioned" (hereinafter collectively referred to as "commissioned") for use as part of a motion picture.

MUSIC IN MOTION PICTURES

Other talents, especially in the music area, including composers and conductors and arrangers of motion picture music have, at least since the early 1950's, been commissioned on a "freelance basis" to write the musical scores, and theme songs for motion pictures.

While in the past motion picture producers regularly employed staff composers working as salaried employees, economic conditions changed and, as music became more and more important to the success of a motion picture, creative decisions were made as to selecting and seeking to engage the very best talent available--people who were no longer staff employees of the producer. [See e.g., affidavit of Ted Cain, in Bernstein v. Universal Pictures, Inc., 379 F. Supp. 933, 183 U.S.P.Q. 422 (S.D.N.Y.) ["the Bernstein case"], quoted in footnote 136. of an article by Angel & Tannenbaum, Works Made for Hire Under S. 22, XXII New York Law School Law Review 209, at 234 (1976).]

The only available basis on which to engage such talented people has generally been to commission them to compose (and conduct) the music for the motion picture. Indeed, as will be discussed briefly below, many such people will only make their

services available on a commissioned basis by which, for tax and other reasons, their services are furnished ("loaned") through their own corporations, formed or controlled or managed by them, and which employ their services for the express purpose of lending their services to motion picture producers on a picture-by-picture basis.

As an indication that the parties in interest have been able to resolve any perceived problem by agreement within the framework of the present Act, a theme that will run through this Statement, a further brief reference to the Bernstein case is useful.

Members of the Composers and Lyricists Guild of America, which had not had a collective bargaining agreement with motion picture producers since November 30, 1971 [Shemel & Krasilovsky, *This Business of Music* at 245-246 (Fourth Edition 1979)], while still in the process of negotiating one, filed a class action suit in federal court in 1972. The plaintiffs alleged, among other things, that the producer defendants had engaged in a conspiracy in restraint of trade to retain copyright ownership in music written by the plaintiffs, music which was subject to royalty payment obligations to the composer arising out of publication and other uses if any of such music, including the continuing automatic payment of the composer's share of performance royalties directly to the composer through his or her performing rights society.

After seven years of pre-trial proceedings, this action was settled in 1979, after the Act went into effect, by a Settlement Agreement approved, after hearings, by the Federal Court in New York. [The Settlement Agreement was published in *Variety*, a trade paper, on Wednesday, March 7, 1979.]

The Settlement, among other provisions, restricts the producer's right to "exploit the music separately" from the motion

picture to the period of 15 months after release of the motion picture. "Exploit" is defined in the Settlement Agreement as obtaining a commercial recording and also the publication of a "printed edition of a major theme" from the motion picture, during that 15 month period, in any one of the following countries: the United States, the United Kingdom, France, Germany or Japan.

If the producer does not succeed in so "exploiting" the music during that 15 month period, the composer shall, for 30 months, have the right to exploit the music, the producer's share of such income to be divided 75% to the composer and 25% to the producer.

As stated in the Court approved Settlement Agreement, "the copyright remains with the producer" [¶1.(2)].

Tax considerations apply to music and other commissioned works. As I am not a tax specialist, I only allude to advice passed on to me that, in order to generate additional retirement, pension, health and welfare benefits--in addition to those available through union and guild Plans, composers and others prefer to provide their services through corporations of which they are direct employees. Such employer corporations then "lend" the services of their employees to a motion picture producer to create a work specially ordered or commissioned as part of a motion picture.

Other composers insist that they be engaged under the terms of a contract in the form of the so-called standard songwriter contract form of the American Guild of Authors and Composers ("AGAC"). Among its other provisions is ¶2. which limits the publisher's rights to a period not to exceed 40 years from the date of the contract or 35 years from the date of first release of a commercial sound recording of the composition, whichever

terms ends earlier [Shemel & Krasilovsky, supra, Form 1]. Compare S203. and S304.(c) of the Act.

WRITINGS USED IN MOTION PICTURES

Writers in the motion picture industry are employed under the terms of the Writers Guild of America ("WGA") Theatrical & Television Basic Agreement of 1981, which has been signed by most motion picture producers and the WGA. This collective bargaining agreement, one that is regularly renegotiated at intervals provided in each WGA -motion picture industry contract, allocates rights between writers and producers, covering not only material written for the producer, but also unpublished material previously written by the writer for himself, and later purchased by the producer.

The WGA Agreement contains detailed Separation of Rights provisions, as well as reversion of rights provisions.

OTHER TALENTS INVOLVED IN MAKING MOTION PICTURES

Many of the other creative people who combine their talents, at the sole risk and cost of the producer, include, of course, the director, the actors, the set designer, the cameraman, the costume designer, the special effects creators, to name but a few. In order to protect the motion picture copyright, which is a separately copyrightable derivative work, not only in the United States, but in foreign countries, it becomes almost essential that there be one author of this derivative work, with one nationality (that of the motion picture producer), freely able to bargain and contract for the many talents and rights incorporated in a motion picture.

Indeed, over the years, just such accommodations have been reached, in direct contract negotiations, in collective bargaining agreements and in litigation settled after hearings in

Federal Court. See generally, Mickey Rooney v. Columbia Pictures Industries, Inc., 538 F. Supp. 211 (S.D.N.Y. 1982), currently on appeal to 2nd Cir.

THE ADVERSE IMPACT OF S. 2044 ON THE MOTION PICTURE INDUSTRY

Some of the negative aspects of S. 2044 were outlined on pages 2 and 3 of this Statement. In addition to those, I wish to raise the following problems that the Amendment would create for the motion picture industry if it were enacted.

Direct and substantial damage to the ability of those at risk--the producers and financial talent who manage the creation, production and distribution of motion pictures--I am sorry to say, would be worked by the Amendment. Of transcending importance to the successful distribution of motion pictures is the potential sequel or remake. Many of the major, successful or soon to be successful (we hope), motion pictures in theatres today are sequels utilizing the very creative talents that appeared in the first motion picture in what may be a trilogy, or even more, of sequels.

For example, consider the fantastic special effects and costume designs in such spectacular motion pictures as "Star Wars," "Star Trek," and "E.T." to name but a few. Without commenting on their contractual arrangements (many of which are confidential), I would point out that the Amendment would in time under §203. of the Act prevent the producers from making sequels to such motion pictures without needlessly recreating at substantially duplicative costs (but without infringing, and thereby making substantially different) special effects and costumes used in the first motion picture.

Since the Amendment would exclude such works specially ordered or commissioned as part of a motion picture from qualifying as works made for hire, even if the parties agree that they should, such works would not come within the exclusions to the

Termination of Transfers and Licenses provisions of §203. and §304.(c), inasmuch as those sections cover "any work other than a work made for hire." Thus, as a result of the Amendment the writer or other creator would be able to secure the return of certain copyright rights under the Termination of Transfer provisions of the Act, notwithstanding the present delicate balance of rights contained in the Act.

NEW USES IN NEW MEDIA

The argument has been made that the writer or the composer, for example, should be protected from new uses of their writings in new media, in the revenue of which they do not share. Recognizing that there may be some merit in this point of view, the parties have continually worked out contractual arrangements that deal with this question in a variety of ways.

Examples are found in detailed residual payment arrangements in industry-wide collective bargaining agreements, agreements of limited duration (usually three or four years) and therefore subject to improvement as in 1981, with Screen Actors Guild, the Directors Guild of America and the Writers Guild of America.

Witness 19. of the standard songwriters AGAC contract, captioned "Negotiations for New or Unspecified Uses," requiring new negotiations with the songwriter for any use of the song "for which no specific provision has been made herein," and that "no such right shall be exercised until specific agreement has been made."

Indeed, many agreements in which motion picture rights are acquired in a book or a magazine article are limited in scope, duration and territory, reserving to the writer many rights, particularly in new media, thereby requiring a new negotiation if use of such rights is contemplated.

FOREIGN RIGHTS

In many foreign distribution arrangements it becomes essential to establish the United States nationality of a motion picture or its music, and to establish, if possible, that the owner of the copyright in all its component parts is a United States national.

Two examples will, perhaps, make the point.

In France, Articles 14. and 17. of that country's Copyright Law of March 11, 1957, provide that only in the absence of proof to the contrary are the co-authors of a cinematographic work made in collaboration presumed to include the authors of the script, the adaptation, the dialogue, the musical compositions, and the director. In Italy, Article 44. of the Italian Copyright Law describes the authors of a cinematographic work as including the author of the "subject," the author of the scenario, the composer of the music, and the artistic director. Exercise of the rights to economic utilization of the copyright belong to the producer by virtue of Articles 45. and 46. of the Law.

In the United Kingdom, in a 1980 case in the House of Lords, the Redwood case, 2 All E.R. 817, and in the settlement agreement applying that decision with respect to musical compositions, it was decided that the determination of the status of the equivalent of our works made for hire would be reached under United States law with respect to "United States contracts." This was established in a case dealing with potential reversion rights in laws throughout the British Commonwealth. See generally section 4.(4) of the British Copyright Act of 1956.

As summed up in Copyright Office Study No. 13, *supra* at 141, 1 Studies on Copyright, 717 at 733:

Ownership in the employer seems most appropriate where the work is created by a more or less numerous team of employees, such as in the case of motion pictures, newspapers and other periodicals, and cyclopedic works (encyclopedias, dictionaries, directories, catalogs, etc.).

If copyright were vested in the numerous team members, third persons wishing to use the entire work would find it cumbersome to deal with all of the employee-authors. Moreover, it is with respect to such works that the contribution of the employer in assembling the group, furnishing the facilities and directing the project is especially significant. Hence, even if it is not provided generally that the initial ownership of copyright in works made for hire vests in the employer, consideration might be given to such a provision for specified kinds of works such as motion pictures, newspapers and other periodicals, and cyclopedic works.

OTHER REMEDIES ARE AVAILABLE FOR ANY ISOLATED "ABUSES"

If, and to the extent that, there may have been isolated abuses or alleged overreaching (and without the opportunity at this time to address any such specifics since none were proffered by the sponsor of the Amendment or any other parties sufficiently in advance of the scheduled hearing), judicial relief is always available if undue pressure has been brought to bear to "force" the signature of a document which does not freely reflect the intent of the parties. This assumes that the writer or composer has not had the benefit of legal and business representation, and the protection of applicable guild or union agreements, or the availability of protective form contracts.

THE NEW RULE AS TO COMMISSIONED WORKS IN THE ACT

Prior to 1978, there was a line of cases including Brattleboro Publishing Co. v. Winmill Publishing Co., 369 F. 2d 565 (2d Cir. 1966), to the effect that a commissioned work would be deemed a work made for hire, without the specific agreement of the writer that the work should be deemed a work made for hire. That rule has been reversed by the Act, now requiring the written agreement of the writer. [See Angel & Tannenbaum, Works Made For Hire, *supra* at 229-230.]

As stated by Mr. Kaminstein in the House Hearings in 1965, *supra*, at 1866:

on balance I believe that the arguments in favor of their (writers and composers) suggestions are substantially outweighed by the practical difficulties they would present.

In view of the fact that the Act now provides that such a commissioned work shall not be considered to be a work made for hire unless the parties expressly so agree in a written instrument signed by each of them, it seems to me that it is not the Act that needs any change in this area and that a legislative solution is not required for any perceived, isolated abuses.

For, in addition to the requirement of such a writing for a commissioned work to be considered a work made for hire, under §201.(b) of the Act the commissioning party will own all of the rights comprised in the copyright unless the parties have expressly agreed otherwise in a written instrument signed by each of them. Thus, the writer or composer has two opportunities to contract with respect to rights in the material.

It is perhaps just that morality can not be legislated, that there is a point (in the case of this legislation reached after 22 years of study, hearings and reports) at which the law must find its support in decent people, striving to create, produce and distribute complex intellectual works--motion pictures--as best they know how, within the dictates of the Law and the Constitution.

THE PUBLIC INTEREST

As stated by this Committee with particular reference to §203. of the Act,, but generally applicable to the entire Act, and especially to the matters covered by the Amendment:

(The Act) reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved. [S.R. at 108.]

Speaking with reference to H.R. 4347, the 1965 Bill which, with the changes noted below, was the predecessor of S. 22 which became the 1976 Act, all of the interested parties, including the Register of Copyrights and the Congress, made the comments dis-

cussed below, with respect to the subject matter of the Amendment.

[For a judicial summary of the legislative history of §304.(c) of the Act, see Judge Edward Weinfeld's Opinion and Decision of July 15, 1982, in Harry Fox Agency v. Mills Music, CCH Copyright Law Decisions ¶25,424.]

On behalf of The Authors League of America, Inc.:

I don't disagree...that a motion picture is a work authored by a motion picture company. It's a composite work, and I wouldn't even quarrel with a section that indulged in what, I think, is the natural presumption that the motion picture company is the author of it...a composite work in which the producer brings together the efforts of many creative skills and talents and merges them in a new work. [Copyright Law Revision Print of the Committee on the Judiciary of the House of Representatives ("CLR") Part 3 at page 274 (1963)].

(The copyright term applicable to a motion picture is) the term provided for "works made for hire" in the true sense, such as motion pictures (unless, of course, the agreement between the screen writer and the motion picture company provides otherwise). [CLR Part 5 at 147 (1964).]

As stated in Angel & Tannenbaum, Works Made For Hire, supra, at 232:

"This argument (to refine the definitions in H.R. 11947) was persuasive enough to cause the following change in the definition of works for hire in the 1965 Bill for Revision (H.R. 4347):"

A work for hire is...a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

This new provision was a compromise endorsed by representatives of authors groups as well as representatives of the motion picture and book publisher industries.

Again, for The Authors League of America:

The second change adds certain kinds of works to the category of those written on special order or commission--as

to which the right of termination could be waived if the author and publisher agree in writing. These are types of material which are usually contained in a collective work. [The 1965 Hearings on Copyright Law Revision before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives ("1965 Hearings") at page 94.]

And at the 1965 Hearings at page 95:

The revision bill is the result of arduous and painstaking effort by the Register of Copyrights and his associates in the Copyright Office. They are to be complimented for their skill and dedication, and for the patience with which they have considered the views of all those who are interested in copyright revision.

These reforms would meet the legitimate needs of authors, of publishers and other copyright users, and of the educational and scientific communities. They would preserve the author's fundamental rights in his work. And, they would more effectively serve the public interest in copyright--which is to stimulate progress in literature and the arts--by securing sound copyright protection for authors.

There then followed the submission at the 1965 Hearings of joint memoranda approving the Bill in substantially the form in which it was introduced as S. 22, which became the 1976 Act. The joint memoranda were signed and submitted on behalf of the following organizations (with the qualification noted below as to the Composers and Lyricists Guild of America):

American Book Publishers Council, Inc.

American Guild of Authors & Composers

American Society of Composers, Authors and Publishers

American Textbook Publishers Institute

The Authors League of America, Inc.

Composers and Lyricists Guild of America, Inc.

Music Publishers Protective Association, Inc.

Music Publishers Association of the United States

[1965 Hearings at 134, 136 and 138.]

Then see the subsequent separate memoranda submitted by the Composers & Lyricists Guild of America, Inc. [1965 Hearings at 271-276] which were answered by the Supplemental Statement of the American Book Publishers Council, Inc. [1965 Hearings 145 at 149] as follows:

The main concession which the book publishers sought to obtain in exchange for withholding their objections to the terms of the present bill on the subject of reversion, is the revised definition of "works made for hire," as set forth in the compromise joint memorandum of April 6, 1965. Now, Composers & Lyricists Guild of America, Inc., even though it had signed that joint memorandum and thereby agreed to the revised definition of "works made for hire" as set forth in that memorandum, seeks to upset the status of works made for hire, both under the existing law and under the bill, and as the Register says, "substitute the equivalent of the 'shop right' concept of the patent law." (Register's statement before this subcommittee on Sept. 2, p. 19) We agree with the Register in opposing the substitution. In this connection, the Register further stated in his testimony of September 2 (pp. 19-20):

"The proposed 'work made for hire' provisions, which are based on this premise, represent a carefully worked out compromise whose effects are felt throughout the bill. The suggestions for changing them are put forward by authors who have already achieved some of the goals they are seeking in the bill by means of collective bargaining agreements, and on balance I believe that the arguments in favor of their suggestions are substantially outweighed by the practical difficulties they would present."

As noted by the Motion Picture Association of America, Inc., in further reply, at pages 1012-1014 of the 1965 Hearings, in comments which apply equally well today to the pending Amendment:

"It was with great surprise that we noted the opposition expressed to the Register's compromise at the hearing before this Subcommittee No. 3 on May 28th last, by the Composers and Lyricists Guild of America, Inc. and the Screen Writers Guild, East. It appears that in the discussions and meetings under which this compromise was developed, they had reservations. They now object to the very basis of the 56-year old concept of our present law concerning authorship in the employer in the case of works made for hire. What these Guilds for screen writers and screen composers have not been able to obtain over the years in their periodic collective bargaining negotiations with the motion picture producers, they now seek to obtain under statute. They propose to take over from the patent system a sort of so-called 'shop right' whereby the employer or person for whom the work was prepared on special order or commission, would have only the

right to use the work for the specific purpose for which prepared. All other rights would be owned by the employee or person who prepared the work, as author. They do provide that the employee or preparer is not to make or authorize competitive use of his retained other rights (which itself would open up areas of conflict). They do permit the employer or commissioner of the work to continue to exploit the work (but without remake rights), despite recapture by the author under sections 203 and 304(c), if the work prepared is a supplementary work, or a derivative work prepared on a pre-existing copyrighted work of the employer or commissioner.

"While the word 'author' is avoided in the proposed amendment of the screen composers and writers for a substitute to section 201(b) of H.R. 4347, it is obvious that the employees or persons commissioned are to be deemed the authors, with recapture and other rights incident to authorship. It is conceded in the proposed amendment that the entire matter is subject to contract between the parties. That is precisely where it should remain--a matter of contract for their collective bargaining, as it now is.

"Employees and persons commissioned to write for motion picture producers are a highly paid profession who do not assume any of the great financial risks of the producer, or guarantee any reimbursement if the film is a flop. The related rights in recordings, live stage and TV dramatizations, novelizations, sequels, etc. are factors which the producer takes into consideration in undertaking the great financial risk of the motion picture production, as well as factors going into its potential exploitation. Historically, screen composers have generally shared in performing society revenues; also in royalties from other sources if the music was published. Over years of collective bargaining, including that concluded only in recent weeks, screen writers and composers have secured by contract great inroads into the ownership of their contributions. Screen writers

reserve, as to original materials written by them, live stage rights, novelization rights and additional payments for sequels. It would be different if the writer chose to be an independent contractor and to invest uncompensated time and effort in producing material for which he would thereafter take his chances in the market place by shopping for a possible purchaser. There is no question but that he should have the status of author in such cases. But where he seeks the safety of guaranteed high pay under an employment or commission, including the fruits of a long series of collective bargainings, and where the producer takes all risk, he should understand that the producer is entitled to the status and copyright effects of authorship."

In the context of this Amendment, the comments of Angel & Tannenbaum, Works Made For Hire, *supra*, at 234 apply:

In the motion picture industry today composers of soundtracks are often no longer on regular salaries, but are specially commissioned to compose music for a movie. It was considered that such independent contractors should be considered employees since their work is at the expense, direction, and supervision of the producer, who has to bring together many different people in order to complete his motion picture or other audiovisual package.

THE 1965 COMPROMISE

By 1965, the essential elements of the Copyright Act of 1976 had been worked out, other than the then cable/copyright, compulsory license/royalty problems, which took almost eleven years to resolve, and are now set forth in §111. of the Act.

A comparison of the 1976 Act with the 1965 Bill will show that the legislative compromises of 1965 held together through 1976, when the Bill became Law. These compromises included the following key elements:

First: A term of life plus 50 years for the author, with a term of 75 years for works made for hire. §302.

Second: Termination of transfers and Licenses, with reversion of certain rights to the author or his statutory successors, under certain conditions spelled out in §203. and §304.(c) of the Act, excluding works made for hire. For example, sequel and remake rights would revert to the author. However, these sections contain the further essential compromise that any derivative works such as a motion picture prepared prior to the effective date of termination may, in the words of the Act, "continue to be utilized"--that is, a completed motion picture and other derivative works can continue to be distributed, notwithstanding reversion of the sequel and remake rights to the author or his statutory successors.

Third: That, in the case of works made for hire, the employer or other person for whom the work is prepared, continues to be considered the author, and, unless the parties have expressly agreed otherwise in a written instrument signed by each of them, the "employer" owns all of the rights comprised in the copyright. §201.(b).

Fourth: That a work specially ordered or commissioned, for use as a part of a motion picture [there are eight other permitted categories including contributions to collective works such as encyclopedias], shall be considered a work made for hire if the parties expressly agree in a written instrument signed by each of them that it shall be so considered. §101.

EMPLOYER OR OTHER PARTY AS AUTHOR UNDER §201.(b)

Professor Melville B. Nimmer of U.C.L.A. Law School, in his recognized treatise on The Law of Copyright, states, in Volume 1, §1.06[C], that:

The employer is not thereby favored over the employee regardless of the intent of the parties. They may agree that the "rights comprised in the copyright" are effectively owned by the employee. The other legal consequences of authorship status, which are not subject to contrary agreement by the parties, do not favor the employer over the employee. They go rather to the copyrightability of the work, and to the term of protection. The same results could have been achieved even if the employee rather than the employer were deemed the "author." The fiction of the employer as author was employed for these purposes not in order to achieve substantive results that could not have been otherwise achieved, but rather because of the "convenience and simplicity" of this manner of achieving such results.²⁶

Professor Nimmer in turn cites at his note 26 the following statement of the law by the Register of Copyrights in his Supplementary Report, CLR Part 6 at 66:

The 1961 Report recommended, in the case of a work made for hire, that the present rule vesting all rights initially in the employer be retained, but without identifying the employer as the "author." In the course of drafting, however, it became clear that there are great advantages of convenience and simplicity in assimilating employers to "authors" for all purposes. It was also pointed out that failure to identify the employer as "author" might have unintended consequences as, for example, with respect to the protection of motion pictures in foreign countries. Thus, since the advantages of making the employer an "author" for purposes of the statute outweigh any conceptual difficulties involved in doing so, subsection (b) of section 201 provides that, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title..."

CONCLUSION

I have not had the pleasure and opportunity, prior to preparing this Statement, of reading other prepared statements to be submitted to this Subcommittee, and hence request that the record be kept open for me to submit a Supplementary Statement within a reasonable time after my return to California. I now conclude this Statement with the following general observations.

The Act was the result of a legislative process that began with the famous Copyright Office Studies of 1955-59, and culminated in 1976 in P.L. 94-553, the Copyright Act of 1976.

If the supporters of the Amendment perceive any real problems, as indicated by the Honorable Senator from Mississippi's introductory statement when S. 2044 was introduced, and as may be indicated by other witnesses before this Subcommittee, it is my judgment that they are more appropriately the subject of contract negotiations between the parties, within the structure of the present Act, and do not indicate a legislative problem.

It may also become appropriate, once the problems are aired before this Subcommittee, for all interested persons, upon reflection, to give further careful consideration to whether any new legislation is needed after less than five years of apparently successful experience with the Act. It is my opinion

that the Amendment is unnecessary as a matter of sound legislative policy.

In particular, I hope that this Statement at least demonstrates that the words "as a part of a motion picture or other audiovisual work," should be retained in the present §101. definition of a work specially ordered or commissioned which may qualify as a "work made for hire" if the parties so agree in writing.

Respectfully submitted,

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Published Writings - Richard Colby

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7. Copyright, in Grolier's Encyclopedia International.
8. Testimony, Committee of Consultants, Copyright Office, House Committee on the Judiciary, Copyright Law Revision, Part 3 at 278-281 (1963-64).
9. Some Essentials in Copyright Revision for Motion Pictures, Address to the American Bar Association Section of Patent, Trademark and Copyright Law, 1963 Section Proceedings 72; 11 Bulletin of The Copyright Society of the U.S.A. 19 (1963).
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14. 1981 American Bar Association Committee Reports of the Section of Patent, Trademark and Copyright Law, Report Committee 307. on Authors, Subcommittee D 4 on Problems of Authors Under Existing Copyright Legislation 153-154.
15. 1982 American Bar Association Committee Reports of the Section of Patent, Trademark and Copyright Law, Committee 307. on Authors, Subcommittee B on Employment for Hire and Joint Authorship, Richard Colby, Chairman.
16. Work Made for Hire and United States Copyright Law, XVI UNESCO Copyright Bulletin (1982) [publication pending].

Senator MATHIAS. You refer to a potential loss of revenue from sequels and remakes.

Mr. COLBY. Yes, sir.

Senator MATHIAS. We have this problem recurring in another context, in relationship to a bill which is pending in this committee on video recorders, the Betamax bill. Senator Specter of Pennsylvania, who sits on this committee, has raised a question of whether that should go on in perpetuity, whether there should not be some point of time in which protection of video recording in that case—and I want to be clear that we are not talking about this bill but its analogous problem—that there should be some point of time when that sort of protection ceases.

Do you see any relationship between that proposition and this one?

Mr. COLBY. I do not, Senator, and I am not in a position to—

Senator MATHIAS. I am not saying that I am in agreement with Senator Specter on that. But I just pointed out that that is a point of view that has been expressed here.

Mr. COLBY. I understand, and I appreciate the question. I would think these problems can be considered separately. I am not equipped to speak to the other issue. But I would point out that in the present act there is a termination of rights provision applicable after a fixed period of years. That fixed period of years was arrived at after 15 of study and recommendation and ultimately the unanimous view of all concerned, including, I may say, the Authors League. Because of the pressure of time, I did not read a phrase setting forth the Authors League point of view in 1963 and 1965. I wonder if I might have perhaps 1½ minutes to add what I will call the view of my other friends.

Senator MATHIAS. Try and make it 1 minute.

Mr. COLBY. Yes, sir.

Senator MATHIAS. Speed up the sound track.

Mr. COLBY. At the 1963 hearings at the Copyright Office, at which I had the pleasure of testifying, as did other gentlemen and ladies present, the Authors League said:

I don't disagree that a motion picture is a work authored by a motion picture company. It is a composite work, and I would not even quarrel with a section that indulged in what I think is the natural presumption that the motion picture company is the author of it, a composite work in which the producer brings together the efforts of many creative skills and talents and merges them in a new work.

Finally, at the 1965 hearings of the House Judiciary Committee, the Authors League said:

These reforms—parenthetically I mean the exact language that is now in the Copyright Act—would meet the legitimate needs of authors, of publishers, and other copyrights users and of the educational and scientific communities. They would preserve the author's fundamental rights in his work, and they would more effectively serve the public interest in copyright, which is to—almost in constitutional language—stimulate progress in literature and the arts by securing sound copyright protection for authors.

Thank you, Senator.

Senator MATHIAS. Thank you, Mr. Colby. You referred to the 15-year struggle on this point. Just a minute ago, I saw Mr. Ben Zelenko enter the room. He is a veteran of that 15-year struggle as the counsel to the great chairman of the House Judiciary Commit-

tee, the late Emanuel Celler. I was a very junior member of the House committee at that time. During the progress of that event, I was translated from the House to the Senate, which is a process which is traditionally known on Capitol Hill as raising the intellectual level of both bodies. Ben Zelenko's continuing interest is to be noted.

Mr. COLBY. I am sure, sir, that Mr. Zelenko would make a contribution to the committee's understanding of the history. I well remember appearing many times before the committee and having the pleasure of the wise judgments of the committee as reported in the House report, which matches the Senate report, No. 94-473.

Senator MATHIAS. Let me ask Mr. Bernstein this question. There has been some testimony here this morning that, even by proponents of the bill, S. 2044 as it is now written will not solve all the problems that the commissioned artists face. How do you think your industry would react to that feeling?

Mr. BERNSTEIN. I am glad you asked that question, Senator. I was going to ask if I could talk to that.

We have heard a lot of talk here today about creating atmospheres really for negotiating. Now, it is interesting that the people that have the strength have been saying all day today negotiate with us. I think the great advantage of S. 2044 is that it will create a better atmosphere for that kind of negotiation.

We had a base stealer on the Los Angeles Dodgers some years ago by the name Maury Wills. Now, late in the season when he was going for a record, up in San Francisco they used to water down the base paths. Now, that is not a very, very good atmosphere in which to steal bases.

I think the passage of S. 2044 would make a fairer atmosphere for that kind of negotiation to take place. I think in that sense it would be a great improvement.

Senator MATHIAS. Do you think that there are any circumstances in which work made for hire is an appropriate basis for a commission?

Mr. BERNSTEIN. I heard other people say it. I think that, if work made for hire were accompanied by classical elements of job security of a plan for advancement for the people who need advancement and had those kinds of protections, offered you those kinds of protections and opportunity for advancement and career building, yes, I think it certainly would be an atmosphere in which the employer in that case should have the advantage of the product of that person's work.

Senator MATHIAS. But not in the empty marketplace swept by the cold winds of adversity?

Mr. BERNSTEIN. Well, I really do feel that way because one of the concomitant things that happens, Senator, is that one of the effects, really, is also to take these music copyrights out of the free market as well.

Senator MATHIAS. Mr. Colby, you seem to be anxious to add one last word to that.

Mr. COLBY. No, not really, because I do not want to disagree with Mr. Elmer Bernstein, with whom we have very fond and lucrative, for both of us, arrangements.

Mr. BERNSTEIN. True.

Mr. COLBY. What I would point out is that, in contracts with composers, it is invariably the case that there is a schedule of royalties for all subsidiary and ancillary uses. For example, if sheet music is published, the rate, I think, is now at least 8 cents, and it is rising. In general, for all other rights, 50 percent of the revenue is paid to the composer regardless of stature. I mean the new, the young, the exciting composer on whom we take a chance because salary or flat payment is made for those services. Interestingly enough, in the music field many composers—although this does not apply, I believe, to Mr. Bernstein; but I am not asking for an answer to this—insist that they not be employees. They want to be furnished through corporations, for such benefits as they see, by being the employee of what I will call their own company.

Senator MATHIAS. I heard you making that point. I understand that. And I think it is an interesting point as one of the practices in the trade.

Let me just say in closing this panel that it is refreshing to have two witnesses here who agree at least that the problem is managing prosperity rather than dealing with adversity. That is an unusual experience for Congress in this particular moment in history.

Mr. COLBY. Then Mr. Bernstein and I have contributed something.

Senator MATHIAS. Yes, you brightened our day. Thank you, gentlemen.

Mr. COLBY. Thank you again for the honor of being here.

Senator MATHIAS. Let me say that in some respects this is a reunion for all of us who have worked a long time in the copyright field. One of those who is here is Bella Linden, who was in constant attendance in the long and protracted negotiations that led to the 1976 act. Out of her experience, I would just like to ask one question, and you can answer right from where you are.

Ms. LINDEN. Perhaps my voice will carry better if I join these gentlemen physically at the table.

Senator MATHIAS. Come join them just for a moment. I just had this one question, which goes back to the question of textbooks.

Do you think that there ought to be any changes as the bill is now structured to accommodate specialized texts? I do not refer to instructional texts because I think that is covered in the various statements that are submitted to the committee. But what about the specialized texts?

Ms. LINDEN. I am reminded that we are not here to pass the kind of general social legislation prohibiting independent contractors, which Ms. Brickman and others in their testimony appeared to urge. In other words, their intent is to abolish a concept of independent contractors in copyright law and urge that employee status be the only basis for the creation of certain kinds of works.

I must also add as a foundation that I am unfortunately reminded that the same thing has occurred over the past 20-odd years, and they were odd years. The discussion always has been as though 10 men, or in this case 110 men and women, blind ones, were asked to describe an elephant. Each held on to the portion that they knew best and described it as the whole.

The fact is that magazine publishing is not only the kind of magazine publishing that Time-Life does. The fact is that encyclopedia

publishing is not only the kind of publishing that Mr. Roebling referred to.

Senator MATHIAS. I think the committee will comprehend that. We just asked them as representative witnesses.

Ms. LINDEN. Well, it is not representative, may I respectfully urge. It is illustrative of certain segments of the industry but not representative of the whole.

Your question with respect to texts, specialized texts, caused me to lay the foundation in such broad terms. Specialized texts could be works on biochemistry or could be specialized works in a reading program, in an elementary science program. There are no finite discrete works that can be covered by that kind of language.

In further response about specialized texts, Senator Mathias, it is respectfully submitted that virtually all instructional texts deal with discrete subject matter for specific age and intellectual levels and are prepared by and with specialists in the various disciplines. Thus it is fair to say that all instructional texts can be described as "specialized."

The concept of the act under which we now are functioning is one of using broad strokes and permitting, not insisting but permitting, certain kinds of works that are normally and habitually created in the various areas mentioned as works for hire. The current language permits the continuation using independent contractors, people who normally work, perhaps full time as employees of universities, of music publishing companies, of other enterprises, to participate in elaborate structured, specialized text programs.

Therefore, I urge most respectfully that your committee—and I am sure it will do so under your aegis, Senator Mathias—consider that these broad words are intended to permit something, not to insist on anything. As to emotional arguments about unequal bargaining power, there will always be certain people in any economic situation who feel they are deprived. There is not a bill, may I submit, or an act or a law that is 100 percent equitable to all. But, by and large, this is an equitable provision that permits the functioning of the various segments of the intellectual property industry.

I urge most respectfully that we do not throw out the baby with the bath water because there are certain specific instances where people, admittedly not under the provisions of the proposed Cochran bill but under the general concept of unequal bargaining position, wish to insure and insulate the so-called alleged unequal bargainers, the less-equal bargainers to an absolute, unequivocal, strong bargaining position.

Senator MATHIAS. I thank you. I now understand about specialized text. [Laughter.]

Without objection, we will insert into the record the additional statements given to the committee.

[Material referred to follows:]

STATEMENT OF

THE SOCIETY OF PHOTOGRAPHER AND ARTIST REPRESENTATIVES, INC.

by Edith Leonian, Chairperson, Copyright and Industry Practices Committees, SPAR

The Society of Photographer and Artist Representatives, Inc. (SPAR) is a professional association based in New York City, with chapters in Atlanta and Chicago. Our members represent an estimated ninety per cent of the top self-employed photographers and illustrators whose work appears in national media.

One of our basic functions is to negotiate on behalf of the visual authors we individually represent the terms of license for reproduction of specially commissioned graphic works. We are, so to speak, in the "front line" of the practical application of that part of Section 101 of the Copyright Act of 1976 addressed by Senator Cochran's proposed amendment to the definition of "work made for hire."

In the normal practice of our industry, the compensation for commissioned artwork and photography is arrived at by negotiation based on both objective and subjective factors, among them the amount of time involved, the degree of skill or specialized knowledge required, the perceived status and reputation of the creator, and the contemplated usage. The extent of rights granted acts almost as a multiplier of the basic range established by the other factors for a minimal use (such as the most common grant to magazines -- one time reproduction rights.)

The introduction of the principle of divisibility of copyright in the 1976 revision of Title 17 reflected the existing practice of our trade, and we expected little or no dislocation when the Act took effect in January, 1978.

We were aware of the "work made for hire" exception to the rule vesting copyright in the author of a work, but tended to regard it as a business decision, not a moral question. Licensing "all rights" generally calls for fees anywhere from

three to ten times those involved in licensing specific uses for limited periods.

"Work made for hire" involves two rights more than "all" rights:

- 1) the creator's right to otherwise terminate any grant of license in thirty-five years;
- 2) authorship.

The value of the first seems somewhat remote, even to a client, since publishers survived very handily under the old law under which they received only 28 years. Loss of the right to terminate could make a substantial difference to the estate of the creator, and to the income of his or her family, however.

The value of the second right, authorship, while minimal in monetary terms from a corporate point of view, is inestimable from that of the true author of a work. Since the vested "worth" of these rights is so much greater for the visual artist than for the publisher, it seemed to us more likely that prospective users would "settle" for "all rights." We could not help but feel that some such scenario was what Congress had in mind by requiring a written prior agreement before an eligible work could be considered a "work made for hire."

Those were our expectations. What has actually happened has been a lot less logical, and a lot more onerous. Experience has taught us to associate the phrase "work made for hire" with attempts to "take" rights without adequate compensation -- with imposition rather than negotiation.

Point: Most of those magazines who routinely request that "work made for hire" contracts for commissioned art or photography be signed expect to pay exactly the same for this vast bundle of rights as they had been paying over the years for "one time reproduction rights."

Point: "Work made for hire" contracts are often presented for signature after the terms of an assignment have been negotiated; after the work has been executed -- even after the work has been published.

Point: Covering letters accompanying such contracts are frequently disingenuous, indicating that signature is needed in order that work may be published at all; that signature is merely a formality with no effect on the grant of rights; that signature is required before payment will be made; etc.

Point: The lower level employees of conglomerates who commission photographs or artwork may in good faith bargain for "work made for hire" at minimal fees based on the limited use actually intended, their perceived inability to negotiate with their own organization's bureaucracy and the trust relationship they have established with their suppliers. Once acquired, the work then passes out of their control and may be used in other publications, in advertising, or for purposes which would normally require royalty arrangements such as trademarks or direct sale to the public. Visual work is peculiarly vulnerable to this kind of recycling and commercial exploitation.

Point: There is an assumption, however unjustified, on the part of those who obtain "work made for hire" that ownership of the physical art or photograph is included. This makes retrieval of the property at best a tough negotiation. At worst, irreplaceable works of art are caught in the inexorable flow of files, transferred to "dead" storage, lost, shredded -- even burned.

Because of the mere existence of the "work made for hire" exception, attempts are made to impose the status even where the intended use does not qualify under the existing second definition in Section 101 of Title 17. Artwork and photography are not commissioned by attorneys -- nor even by corporations whose counsel are necessarily conversant with the niceties of copyright law. So the phrase shows up -- almost always after the fact -- on purchase orders requiring signature; on purchase orders not requiring signature; on

the back of checks -- even in the face of a clear, fully executed copyright license detailing rights granted. The fact that such clients may be misleading themselves as to their legal status is a comfort neither to us nor to the creators we represent. We feel the only healthy situation is one in which the perception of rights acquired and the fact be one and the same.

Our members do the best that they can to clarify understanding, but in the real world, as individuals dealing with bureaucracies, a point is reached where such efforts become counter-productive. At that point, the best of us, and the best of the talent whether we represent them or not, find we must simply walk away.

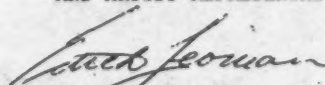
The creators we represent, being by and large the elite of the field, are able to risk the loss of income which such action may involve. They and we are most concerned about those who are most vulnerable to losing their authorship under "work made for hire" -- young artists and photographers, easily intimidated, who do not understand that what they are signing away is not only their present advantage, but their future assets and the basis of their estates.

We are concerned as well about the visible loss of graphic quality in the nation's publications which is resulting from the reduced participation of the best of America's photographers and artists.

S 2044, the amendment offered by Senator Cochran, goes far toward alleviating the problems of literary authors, but would leave visual authors still partially vulnerable. We hope that the Committee will give full consideration to extending the language of the amendment either by removing references to "supplementary works" from clause (2), or by making it clear that works of visual authorship are not intended to be included in that category.

Respectfully submitted,

THE SOCIETY OF PHOTOGRAPHER
AND ARTIST REPRESENTATIVES


by Edith Leonian

TESTIMONY OF AMERICAN BUSINESS PRESS

American Business Press (ABP) files this testimony in opposition to S.2044 which would exclude periodicals from the "work for hire" provision of the Copyright Act where an article is solicited by a publisher from a writer who is not an employee of the publisher. We believe enactment of S.2044 would represent an unwarranted reversal of longstanding judicial and legislative copyright policy--as it existed both before and after enactment of the Copyright Revision Act of 1976.

ABP is a publishers' association of over 500 specialized business, technical, scientific and professional journals circulated nationally and internationally. A list of the members of ABP is attached. The information created and published by ABP publishers is vital to key decisionmakers in every segment of American technology, industry and business. Examples of ABP periodicals include Aviation Week and Space Technology, Datamation, Defense Electronics, Iron Age, Laser Focus, Medical Economics, Public Utilities Fortnightly, Railway Age, Telephone Engineer and Management, and Word Processing and Information Systems.

ABP periodicals employ full-time editors who are experts in the highly specialized fields covered by these publications. Frequently, they also commission outside experts to write articles of interest to readers in order to provide better editorial coverage. The expense of publishing these outside articles is borne by the publisher.

At the present time, the publisher is presumed to own the copyright in a commissioned article as long as there is an express written agreement between the publisher and the author to that effect.

Section 101 of the current Copyright Act defines a work for hire for commissioned work as follows:

"a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instruc-

tional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire." [Emphasis supplied.]

The foregoing section of the 1976 Act gives authors stronger rights to ownership of a commissioned article than they had in the pre-1976 Copyright Act. The presumption existed in the pre-1976 Act that the publisher and the author implicitly agreed that the publisher had the copyright where the publisher commissioned an article from an author. Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 568 (2d Cir. 1966).

Section 101 of the 1976 Act also vests ownership of the copyright of a commissioned article in the publisher, but only if there is an express written agreement between the author and the publisher to that effect. See May v. Morganelli-Henmann and Associates, 618 F.2d 1363, 1368, n.4 (Ninth Circuit 1980).

Additionally, the work for hire doctrine for commissioned works was restricted by Congress in 1976 to certain categories: collective works (periodicals), films, translations, compilations and supplements, instructional texts, tests or atlases. Other kinds of commissioned work--e.g., musical compositions and books not falling within the foregoing categories were not included as works for hire.

The report of the Senate Judiciary Committee accompanying the 1976 Act explains that the final language of the 1976 definition of works for hire was a compromise, when it stated:

Works made for hire.

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures. Their proposal was for the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of

his regular business, but the employee would retain all other rights as long as he refrained from authorizing competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange it for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances. [Emphasis supplied.]

Under the 1976 Act, an author commissioned to write an article can veto the publisher's copyright by not signing a work for hire agreement. It is difficult to see what practical purpose¹ is served by S.2044 other than to upset a carefully crafted compromise.

It is the publisher who conceives of the need for a work for hire article, pays for its physical production and for its delivery to the reader. Publication of the article provides recognition for the author among his professional peers and the public, a benefit not to be lightly dismissed. The work for hire doctrine promotes the dissemination of important scientific, business and technical information. As database publishing becomes more common, there should not be impediments to the publisher's flexibility to determine how articles can best be

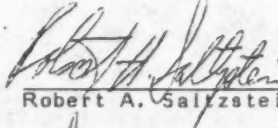
¹The elimination of periodicals from the work for hire provision also would mean that after 35 years, copyright in a commissioned article would revert to the author, where the author originally assigned copyright to the publisher. Permitting authors to claim copyright after 35 years in an article originally commissioned by the publisher hardly seems worth disrupting the balance Congress wished to maintain between publishers and authors.

distributed to the public. S.2044 will only discourage the use of outside articles and will result in a smaller quantity of needed information at a time of rapid technological change.

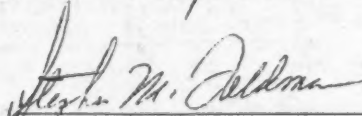
We urge the subcommittee to recommend that S.2044 not be enacted into law. It is piecemeal legislation which is unfair to publishers who provide an opportunity to writers for publication which otherwise might not exist. There is no reason to change the principle, long-embodied in copyright law, that the work of an independent contractor specially commissioned to contribute an article should be treated as an article written by a staff editor.

Both staff written articles and commissioned articles are created by the financial investment and creative inspiration of the publisher. Both are works for hire. The present statute should not be changed.

Respectfully submitted,



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Counsel for American Business
Press

STATEMENT OF BELLA L. LINDEN ON BEHALF OF HARDCOURT
BRACE JOVANOVIICH, INC. ON S.2044

I am a member of the firm of Linden and Deutsch and write as counsel to Harcourt Brace Jovanovich, Inc. ("HBJ"), a leading publisher of instructional materials for schools, colleges, and the professions.

The purpose of this submission is to express HBJ's views on S. 2044, a bill which seeks to amend the definition of "work made for hire" under the U.S. Copyright Act.

The provision of the current Act permits but in no way obligates contributors to certain categories of works from participating in the creation of works made for hire. Prior copyright laws, and our present Copyright Act, permit legal persons such as corporations-and not just individuals-to act as authors of works with all the attendant rights of authorship under law. Enactment of the proposed bill would prevent certain contributors from agreeing to have their contributions treated as works made for hire.

It is the clear intent of Article I, Section 8 of the Constitution to give authors proprietary rights in their works as an economic incentive. Our Founding Fathers recognized that in order to stimulate intellectual expression and generate a multiplicity of authorship and variegation of points of view in a private enterprise system, economic reward must be available to authors. With advances in technology, the successive copyright laws of the United States have given formal recognition-in addition to literary works-to newer forms of expression including phonograph records, motion pictures, computer programs, and other works. Moreover, as reference works and encyclopedias and other major collaborative efforts have increasingly become the products of group effort and the result of the investment of time, creative effort and money by legal persons such as corporations, e.g., publishers and publishing consortiums, our developing copyright law recognized and gives clear recognition to that form of authorship under the work made for hire doctrine as worthy of the same protection as is afforded to individual authorship.

The work made for hire concept was narrowed in the 1976 Copyright Act. The 1909 Copyright Act permitted a work made for hire to be created for any kind of work which was (1) prepared by an employee within the scope of employment; or (2) created on special order or commission. The 1976 Act excludes from work made for hire status (unless prepared by an employee within the scope of employment) all works except specifically designated categories of works (such as instructional texts, reference works, and motion pictures). The current Act further places the burden on the person or entity claiming that the contributor agreed that his/her work shall be a work made for hire by requiring that such agreement be in writing, signed by the contributor.

The history of negotiation and dialog between authors' representatives and publishers' and producers' representatives makes it clear that the Author's Guild representatives caused the narrowing of the categories of works that could be works made for hire. Publishers' and producers' representatives agreed to limit the kinds of works which could be considered commissionable works made for hire and to the further requirement of a written agreement stipulating that the commissioned work is a work made for hire. The compromise was predicated on the philosophical recognition by the Register of Copyrights, Congress, and by authors' representatives that certain kinds of works, such as instructional

textbooks, reference works, and motion pictures, logically should be permitted to be works made for hire if the parties so agreed. The Act of 1976 does not state that all instructional materials, reference works, or audio-visual materials must be works made for hire, but it simply does not prevent or prohibit the creation of such materials as works made for hire.

The 1965 Report of the Register of Copyrights characterized the work made for hire definition as a "difficult and hotly contested issue" and explained that the "the definition now in Section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides." (emphasis added) The compromise approach concerning commissioned works was adopted by Congress and was reflected in a bill passed by the House on April 11, 1967, which listed the categories of commissionable works to include: contributions to collective works, motion pictures, supplementary works, compilations, and instructional texts, as well as translations, tests, and atlases. The 1967 bill definition is closely similar to the definition in the current Act.

Chapter XI of the Draft Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill (November, 1975), summarizes the development of the definition of work made for hire. The "General Background" portion of the Chapter states:

"During the pre-legislative period in the current revision program, and particularly between 1961 and 1965, the provisions on ownership and transfers of copyright were the subject of close scrutiny, some hot debate, and a great deal of tortuous drafting and redrafting. Almost every provision in Chapter II represents a compromise of one sort or another, and those involving works made for hire and termination of transfers were extraordinarily difficult to achieve. However, by the time the bill reached the stage of hearings before the House Judiciary Subcommittee in 1965, most of the disagreements were on the way to being resolved. After painstakingly reviewing Chapter 2, particularly the labyrinthine provisions of section 203, and after adopting some amendments, the subcommittee produced a chapter on copyright ownership and transfer together with a definitive legislative report, that have remained unchanged and virtually unchallenged for nearly ten years."

The following is clear from the developments leading to the present Act:

1. The definition of a work made for hire as concerns commissioned works is restricted to designated categories of works only, and only if there is a written agreement recognizing the work as such. Thus, the 1976 Act is more favorable to authors than the 1909 Copyright Act.

2. The Act's definition is permissive, not mandatory. For eligible categories of works, the parties may by contract but need not, create a work made for hire. Only if the parties agree that a commissioned work is to be a work made for hire is such a status created.

S.2044, if passed, would eliminate from the categories of commissionable works collective works (which include by definition in the Act periodicals, anthologies, and encyclopedias), motion pictures and other audiovisual works, and instructional texts.

The effect of such amendment would be in the eliminated categories to bar a commissioning party from being considered the author of a work as a matter of law. While the present Act permits (although does not obligate) the parties to create a work made for hire status for works falling within these categories, the bill would preclude the parties from so doing despite any intentions or agreement to the contrary.

Such an amendment will cause serious repercussions on the educational publishing industry and the educational community which it serves. While it is true that pursuant to Sections 201(d) and 204(a) of the Act the commissioning party could obtain from the author an assignment of all rights in the author's work, the author would be entitled pursuant to Section 203 to recapture all rights in his/her work forty (40) years after the date of the assignment or thirty-five (35) years after the work is first published, whichever is first.

It is rare these days that instructional materials for our schools are conceived and created by the lone author sitting at a desk to fulfill an educational need by writing a textbook on speculation, as it were, that a publisher will accept and distribute his work. To the extent that this was a method of creation of instructional materials in the past, an author's work tended not to fit a specific grade and was not integrated in the succession of books marked by methods of learning, much less in other parts of the main or whole school curriculum. Modern instructional materials are in fact the main means by which a national curriculum has been established in most learning skills and academic disciplines. Publishing programs, involving many hands and the beneficial aid of a publisher's professional staffs respond to curricular needs in most states and communities. Creation of instructional materials to meet curricular needs has indeed become a main responsibility of the publishing industry.

The creation of a new instructional program for elementary and secondary schools and for freshman and second-year courses in community colleges and other colleges is usually an enormous undertaking. If it is to meet learning needs, it must be substantially revised every three to five years. The revision is itself a large undertaking. Each revision builds upon the scores of individual contributions of staff members of the publishing house, of paid consultants, of freelance contributors to the previous editions of the program.

HBJ publishes numerous elementary school textbook programs in reading, language skills, spelling, literature, mathematics, science, health, social studies, foreign languages, and humanities/art. It publishes secondary school and college course programs in history, literature, science, language arts, civics, foreign language, economics, sociology and psychology. HBJ is continuously involved in revisions of these educational materials. HBJ has just completed substantial revisions of its reading and language arts elementary school program from kindergarten through eighth grade involving hundreds of

individuals, including in-house editors, book designers and production managers; freelance teacher-consultants, writers, illustrators, map makers, editors, copy editors, and indexers. Teachers and students have contributed to the authorship of the materials in each edition of each of these programs. In the course of each revision of each program, not only is there incorporated material from prior editions but scores of new individuals may participate in the creation and development of the revised program.

A graphic illustration is HBJ's Eagle edition of its Bookmark reading program which comprises 266 separate, although integrated, components.

The Bookmark reading program was conceived in the late 1950's. Components of the first edition were published in 1968. The original editors who worked on the first edition are no longer with HBJ; indeed, for each edition, there is generally a new set of editors in charge of developing and preparing the program. More than one hundred in-house editors have successively participated in what now becomes the Eagle Edition, the fourth edition of the work. The Eagle Edition represents a capital investment by HBJ in excess of \$10 million.

It should be noted that a publisher such as HBJ, which is typical of other houses which publish many school textbooks and series in the elementary and secondary school and college subject areas, does not have the capacity to employ, and to supervise on a full-time basis, all the writers, editors, copy editors, artists, map makers, layout editors, photographers, and consultants needed to prepare all of the school textbooks and attendant teaching and learning aids. It must use freelance talent; and the current trend is to engage certain small businesses, which themselves commission writers, editors and illustrators who are not full-time employees. Moreover, HBJ as well as most publishers seek out the finest experts, schools and universities to act as consultants in the creation of educational works. Obviously, scholars and experts in particular fields are rarely available, or willing, to become full-time employees. However, their contributions, while seldom separately identifiable portions of the collaborative effort, are extremely valuable.

With few exceptions, most contributors to the instructional programs who are not full-time employees of HBJ are commissioned by HBJ and sign work for hire agreements vesting authorship in their contributions in HBJ. In addition to individual freelancers, HBJ contracts with independent freelance houses, which have their own staffs of writers and editors and who, themselves, commission third parties to handle assignments received from HBJ. Thus, in many instances, the HBJ project supervisors have never met nor know the identity of writers who have participated in the creation of the programs.

It is helpful to summarize briefly the evolution of another recently revised HBJ textbook program, the Phoenix Edition of Language For Daily Use, the original edition of which was first published in 1948. (Subsequent editions were published in 1952, 1957, 1960, 1961, 1965, 1970, 1978). The current edition includes the following works for each grade level: (1) pupil's edition; (2) teacher's edition; (3) pupil's workbook; (4) teacher's edition of pupil's workbook; (5) extra practice masters; (6) testing book; (7) teacher's resource book; (8) microcomputer management system of tests (includes diskettes, answer cards and manual). In total, there are 74 separate but integrated works in the program; and HBJ is at present preparing audio cassettes of poetry for each level.

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Such a program is developed as follows:

1. Editors from the School Department of HBJ, some of them former school teachers, hold periodic meetings to discuss whether the existing program can be revised to meet the current identifiable needs of students in schools in highly diverse communities. HBJ editors receive from its sales personnel statements of needs and requirements of school districts around the country. Moreover, paid consultants with expertise in the subject matter of a particular series are enlisted. Educational trends are discussed and analyzed, as well as the sales record of a particular series. In the case of Language For Daily Use, a substantial revision was prepared approximately three years ago.
2. Once the need for a new program or revision has been determined, a detailed pedagogical plan, known as a "scope and sequence," is created by editors at HBJ together with outside consultants engaged by HBJ. The scope and sequence document is the blueprint, the pedagogical heart of an instructional program. The scope and sequence is sent for review and contributions by teachers and supervisors in the field who are often under contract with HBJ.
3. In-house editors, as well as commissioned freelancers, write sample material for chapters in the program for both pupil and teacher texts based on the outline and specifications furnished by HBJ.
4. Under the supervision of HBJ's Division of Verifiability and Testing, sample chapters are distributed for testing by many representative school districts throughout the country. Hundreds of students, teachers, and administrators review the materials and these are returned with critiques and suggestions. Many of these teachers and administrators are under contract to HBJ to provide such contributions to the program.
5. HBJ contracts individual freelancers and freelance houses for the preparation of a first draft of the pupil textbooks and other components of the program.
6. The first draft is reviewed, analyzed, and edited, both in-house and by freelance editors, and portions are revised and/or rewritten. The revised first draft materials are then distributed to teachers and administrators again for review and comment.
7. The second draft is edited and rewritten, often several times, in-house and by freelance editors. Consultants are also engaged to review and contribute to the draft.
8. Photographs and illustrations and page designs are prepared, both by in-house and commissioned persons, during stages (5), (6), and (7), above and (13) and (14), below.
9. After changes resulting from the editing are discussed and incorporated, the manuscript goes to production staff at HBJ which designs the works, selects the type specifications for typesetting by an outside compositor, and integrates all graphics and "front" and "back" matter.

10. Galley proofs are then edited by in-house editors and reviewed by commissioned freelance proofreaders.

11. The revised galleys are sent to HBJ's production department which prepares a dummy layout of the works. The dummy includes text and spaces for illustrations and photographs. HBJ staff places illustrations and photographs. Freelance artists who were commissioned to create such artwork are often asked to revise their work or add to it. Freelance design houses and photograph suppliers, and the individual freelance artists and photographers all make individual contributions to the programs. They number in the hundreds.

12. The work goes into final production. More sets of galleys are followed by page proofs and "blues," which contain final artwork and text. When approved by HBJ editors, the work goes on press.

13. In order to prepare microcomputer components of the program, components are furnished to computer software houses which convert elements of the program for computer use. Since different models of computers operate on different systems, different manuals are prepared for each computer.

14. Where filmstrips are included in a program, as in HBJ's Bookmark, visual and audio components based on HBJ's detailed scripts and specifications are contributed by freelancers and outside houses providing such services.

What is clear from the creation of the most recent edition of Language For Daily Use, or the creation of Bookmark, and is representative of other school programs, is that it is the product of authorship of hundreds of people. No one individual or handful of individuals is the "author" of the works. For the most recent edition of Language For Daily Use, HBJ's files contain 760 separate contracts with individual freelance contributors and freelance houses covering individual contributions of textual and graphic materials. This does not include the contributions by full-time employees of HBJ. The named authors contribute only some textual elements of the program and do so on the basis of the publisher's creative initiative, outline, editing, written contributions and approval. The principal creator, and hence the principal author, is HBJ, which conceives, develops, and is responsible for the final product.

Moreover, the publisher's authorship does not end here. A single edition of a school program is often reprinted, and it is not unusual for an edition to be reprinted more than five times. Such reprintings contain corrections, changes, deletions and additions resulting from the experience of use of the works in schools.

Reprintings are to be distinguished from revised editions such as the most recent edition of Language For Daily Use. The frequency of revision is dictated by evolving changes in educational approaches and by the demands of state curriculum adoption agencies. Full revisions are currently made every three to five years. New materials in revisions, and even in reprintings, are often contributed to a large extent by in-house personnel and by freelancers who did not participate in the original edition. Thus, as a program evolves, hundreds of more people will contribute authorship to the individual components.

The final product bears the approach, concept, and the creative stamp of HBJ. It is virtually impossible to isolate the contribution of any one particular individual. That is why such works are traditionally and virtually exclusively prepared pursuant to work for hire contracts. Allowing each contributor to be considered the author of his/her work will wreak havoc on the publisher and on the curriculum of American schools.

HBJ could obtain assignments of copyright instead of work for hire agreements from each contributor. Thirty-five or forty years hence, however, any or all of these contributors could by law terminate their grants of rights. This raises the insuperable problem-how to isolate the particular contribution an author made 35 or 40 years ago? Due to increased reliance on freelance houses, the publisher does not even know who many of the contributors are. Even known direct contributors are many people who often sit together at the editor's conference table. Contributions are edited, rewritten, and changed so many times before and after publication, such that a particular author's contribution can no longer be identified either quantitatively or qualitatively. This is especially so where 35 or 40 years later, the current editors are not themselves the editors at the time the works were first published. Further, HBJ has no facilities to retain copies of each and every submitted contribution during the course of the creation and development of a program. It has no way of ascertaining at the time a program is published, let alone 35 or 40 years later, which individual or individuals can clearly and discretely be credited with the authorship of any particular part in a program.

By requiring that each such contributor must retain copyright ownership, the bill would threaten that a contributor or his statutory successors can seek to enjoin any further publication of the program.

The contributor or his successors could serve a notice of termination on the publisher and then either demand whatever sum they want to allow the publisher the right to continue using the contribution, or else threaten to sue or take the "contribution" to a competitor. This would impose an impossible record-keeping burden on the publisher. After 35 years, the publisher would have to determine the extent of the authorship contribution of the terminating contributor and review same, assuming it can be identified after so many years. Every author believes his work is a significant and primary contribution, even if the particular contribution is in fact minor, or was published in a form dissimilar from what was submitted. The costs of a number of potential litigations would be a significant "chill" to keep publishers from making the financial investment to meet instructional needs of our schools.

Instructional programs are improved by incremental development. Successful portions of the programs are retained and refined, while those that do not appear to be working properly are redeveloped or replaced. By borrowing from and improving upon prior editions, the publisher is able to improve the quality of its product. If, after 35 years, the publisher were forced to start completely from scratch, the prior efforts and investment would no longer be available to it.

The more people who contribute to a program, the greater the chances that the publisher will be unable to use the works or face the threat of copyright infringement litigation in the future. This is not a trivial or hypothetical fear. Revisions borrow from their predecessors. While approaches in expressing learning change, many elements in a work do not. It has been the experience and can be expected to be so in the future—that portions of textbook materials, whether paragraphs, exercises or whatever, or concepts and approaches, may still appear in the same or modified form in future editions. Indeed, with today's "back to basics" philosophy, approaches, techniques, and exercises of years back suddenly are better accepted than they were a decade ago. Material published today—or perhaps in its revised form in the future—may still be relevant, and sought, 35 or 40 years from now. Indeed, revisions of venerable HBJ programs are still being published today. Adventures in Literature was first published in 1927. Warriner's English Grammar and Composition was first published in 1948. Language For Daily Use was also first published in 1948. College programs also have persisted over twenty or thirty years.

Moreover, a school or junior college program is a carefully integrated system. Deletion of any portion causes an unraveling of curricular thrust. For example, if a publisher were required as a result of termination of rights by a contributor to drop portions of a pupil text, the exercises in connection therewith and the teacher's edition, and other ancillary components of the program would have to be revised.

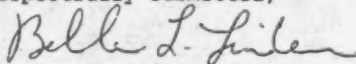
In order to attempt to protect themselves against such risks, two options appear to be open to publishers, either of which would be greatly detrimental to our schoolchildren and schools. One is to go out of the business of producing significant instructional programs as distinguished from individual, random, and largely unrelated textbooks, thereby decreasing the competition in the marketplace and limiting the choices available to educators. The other is to minimize the risk by severely curtailing the use of freelance contributors and consultants to assist in the preparation of programs and thus drastically reduce the quality of work that can be expected to be produced or the number of programs developed. In the end, the public would lose. There would be less diversity of instructional materials, and less excellence.

Others would be significantly injured besides our school children. If fewer publishers publish school programs and the remaining publishers publish fewer programs, fewer freelance writers and artists will be hired and less paper and printing and binding businesses will be available to other entrepreneurs.

It is not viable to suggest that the publisher employ all of the people involved in the preparation of school or even college materials. The publisher does not have the resources to hire all of these individuals. Many freelancers and consultants do not want to be employees of a publisher for various reasons. Many are engaged in writing and preparing works other than school materials; many work on projects for competitive publishers.

The effect of the bill is to increase the regulation of both a business and a cultural industry. Rather than allow the parties the freedom to negotiate terms which they believe to be acceptable and suitable for the work involved, the law would preclude a practice vital to producing quality instructional material. One recalcitrant contributor could prevent the continued collaboration and distribution or revision of works-even if no individual contributor really can be called the "author" of the final product. The present work made for hire definition recognizes the reality of curricular needs and their fulfillment. It is respectfully submitted that the proposed amendment of the work made for hire definition would prevent the future development of high quality instructional materials to the detriment of our educational system for the sake of a hypothetical but improbable benefit to a few individual authors.

Respectfully Submitted,



Bella L. Linden

Linden and Deutsch
110 East 59th Street
30th Floor
New York, New York 10022
Telephone: (212) 758-1100

Dated: September 28, 1982
New York, New York

Senator MATHIAS. I had hoped that the author of the bill, Senator Cochran, would be able to be here. But, as all of you who are familiar with Senate procedures will realize, the Senate is now in session. Senator Cochran has been detained on other business. However, he has sent a statement in support of his own bill. I will include that as a part of the record, without objection.

[Material referred to follows:]

PREPARED STATEMENT OF SENATOR THAD COCHRAN

Mr. Chairman, last February I introduced legislation to amend the Copyright Act of 1976 regarding the definition of a "work made for hire." The need to amend the law was brought to my attention by Mr. Bern Keating of Greenville, Mississippi, who was President of the Travel Journalists Guild. Mr. Keating is also a member of the Authors Guild, the Society of American Travel Writers, the American Society of Journalists and Authors, and the Overseas Press Club, and his views reflect the widespread interest and concern of writers and artists in securing an amendment to the work for hire provisions.

The general intent of Congress when it enacted the Copyright Act of 1976 was to secure copyright ownership in the author or creator of a work except with regard to employees and certain works specifically commissioned by publishers. My amendment would alter the definition of a "work made for hire" in Section 101 to exclude from its coverage a work composed as (1) a contribution to a collective work, (2) a part of a motion picture or other audiovisual work, and (3) an instructional text, areas thought most subject to abuse.

Since February I have been contacted by representatives from various organizations ranging from the Graphic Artists Guild, the American Society of Journalists and Authors, and the Washington Independent Writers to the Association of American Publishers, the Motion Picture Association, and the Magazine Publishers Association concerning their views on the issue of work for hire.

Publishers argue that work for hire should apply to contributions to collective works, instructional texts, etc. where the publisher exercises close supervision and direction over the development of the work. Otherwise, the publisher cannot bear the development risks involved in the creation of a copyrightable work. Publishers

further state that creative artists are protected by the law's requirement of an express agreement in writing.

Freelance writers and artists counter that they are being presented with work for hire contracts on pieces that, contrary to the intent of the Act, are neither supervised or directed by publishers as to content or style. Because they do not acquire the status of an employee under such work for hire contract, they receive none of the benefits that employees would as compensation for surrendering copyright ownership to the publisher. They further cite overreaching on the part of the publishing industry in forcing work for hire contracts and instances of restrictive endorsements on payment checks.

Mr. Chairman, it is apparent that there is much dispute as to what the problems are and how they should be resolved and that a hearing to explore the issues is greatly needed. I commend the Chairman for providing this opportunity for these groups of writers, artists, publishers, and others to fully discuss their views on this particular aspect of the Copyright law.

Mr. Chairman, it is my hope that this hearing will prove productive and result in a solution, either legislative or in industry practice, satisfactory to all parties.

Senator MATHIAS. I want to thank all of you who are here. Some of you traveled great distances to be here.

I think it is important that you came. We in the Congress are necessarily generalists in the broadest sense. If the business community, the artistic community, and the general public, for that matter, does not come to Congress and tell us what the facts are in a given situation, we will never know. We have to depend on you for the knowledge that only you hold. So, by attending here today and by laying the story on the record, I think you have given the committee an opportunity to become acquainted with the situation, to make some judgment on the nature of this problem and how widespread it is, how many people it affects, and to draw what we hope will be the proper conclusions. Thank you very much.

The committee stands in adjournment, subject to the call of the Chair.

[Whereupon, at 11:18 a.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

TESTIMONY OF BENJAMIN A. GILMAN, REPRESENTATIVE FOR THE 26TH DISTRICT OF NEW YORK, BEFORE THE SENATE SUBCOMMITTEE ON CRIMINAL LAW ON OCTOBER 1, 1982, ROOM 2228 DIRKSEN BLDG.
9:30 A.M.

I THANK THE DISTINGUISHED SENATORS FROM MISSISSIPPI, MR. COCHRAN, AND FROM MARYLAND, MR. MATHIAS, FOR THE OPPORTUNITY OF SUBMITTING TESTIMONY IN THIS HEARING INVESTIGATING THE PRACTICES RELATED TO THE WORK-FOR-HIRE PROVISIONS DEFINED UNDER THE PRESENT COPYRIGHT ACT AND THEIR EFFECT ON THE NEED FOR LEGISLATION LIKE S. 2044. I STRONGLY SUPPORT SENATOR COCHRAN'S BILL AND PLAN TO INTRODUCE SIMILAR LEGISLATION IN THE NEAR FUTURE IN THE HOUSE.

I COMMEND THE SENATORS FOR THEIR EFFORTS ON THIS ISSUE AND FOR THEIR DILIGENCE IN HOLDING HEARINGS, WHICH HAVE BEEN SO DESPERATELY NEEDED. I HOPE THAT THESE HEARINGS WILL INVESTIGATE WHETHER THE 1976 COPYRIGHT LAW'S REDEFINITION OF WHAT CONSTITUTES "WORK-FOR-HIRE" SUFFICIENTLY PROTECTS THE CREATOR'S FREEDOM OF CONTRACT AND OWNERSHIP RIGHTS IN HIS OTHER CREATIVE WORKS. IN ENACTING REVISIONS TO THE WORK-FOR-HIRE SECTION OF THE COPYRIGHT ACT OF 1976, CONGRESS INTENDED TO GIVE GREATER CLARIFICATION TO WHAT CONSTITUTES A "WORK" MADE FOR HIRE AND TO GIVE GREATER PROTECTION TO AN INDIVIDUAL WHO IS NOT AN EMPLOYEE OF A PUBLISHER BY REQUIRING THAT THESE INDIVIDUALS GIVE EXPRESS CONSENT TO HAVE THEIR WORK CONSIDERED A "WORK MADE FOR HIRE."

HOWEVER, NUMEROUS REPORTS FROM FREE-LANCE WRITERS, PHOTOGRAPHERS, AND GRAPHIC ARTISTS INDICATE THE 1976 WORK-FOR-HIRE PROVISIONS DO NOT SUFFICIENTLY PROTECT THEIR RIGHTS AS CREATORS TO OWNERSHIP OF THE COPYRIGHT ON THESE WORKS AND TO ALL SUBSIDIARY RIGHTS ATTACHED. IF WE TRULY BELIEVE THAT THE PURPOSE

OF OUR COPYRIGHT LAWS IS THE ENCOURAGEMENT OF THE CREATION OF INDIVIDUAL, ARTISTIC, MUSICAL AND LITERARY WORKS BY ASSURING THAT THE CREATORS ARE GIVEN ADEQUATE COMPENSATION AND CONTROL OVER THESE WORKS, THEN WE MUST CAREFULLY EXAMINE WHETHER THE PRESENT DEFINITION OF "WORK-FOR-HIRE" SATISFIES THIS LEGISLATIVE INTENT. IF A PREREQUISITE TO FREE-LANCE PUBLICATION IS THE SIGNING OF A "WORK-FOR-HIRE" CONTRACT, THEN THERE ARE SERIOUS PROBLEMS WITH THE CURRENT LAW, AND IT MUST BE CHANGED.

OUR NATION IS BASED ON THE PRINCIPLES OF INDIVIDUAL FREEDOM AND CREATIVITY, OUR LAWS SHOULD PROTECT TO THE FULLEST THE RIGHT OF FREEDOM OF EXPRESSION. FOR THE FREE-LANCE WRITER, PHOTOGRAPHER, AND GRAPHIC ARTIST TO FLOURISH AS INDIVIDUAL CREATIVE VOICES IN OUR LAND, THEY MUST BE TREATED FAIRLY. IN AN AGE WHEN THE COMMUNICATION AND MEDIA FIELDS HAVE BECOME SO IMPORTANT AND ENORMOUS ENDEAVORS, IT IS CRUCIAL THAT THE VOICE OF THE INDIVIDUAL CREATOR IS NOT SNUFFED OUT NOR SUBORDINATED TO THOSE WITH THE LARGEST FINANCIAL INVESTMENTS. IT IS TRUE THAT PUBLISHERS IN OUR LAND TAKE GREAT RISKS, BOTH ECONOMIC AND SOCIAL, TO SEE THAT AMERICANS AND THE WORLD HAVE ACCESS TO ALL POINTS OF VIEW AND TO THE CREATIVE GENIUSES IN OUR MIDST. THOSE WHO WORK FOR THESE EMPLOYERS ARE REIMBURSED ON A STEADY BASIS, IN ADDITION TO HAVING ALL OF THE PRIVILEGES AND BENEFITS THAT GO ALONG WITH WORKING FOR A REPUTABLE EMPLOYER.

ON THE OTHER HAND, THE FREE-LANCE AUTHOR, COMPOSER, AND ARTIST DO NOT HAVE THIS ASSURANCE. INSTEAD THESE CREATORS

MUST DEPEND ON THE COMPENSATION THEY RECEIVE FOR EACH WORK THEY HAVE POURED THEMSELVES AND THEIR OWN RESOURCES INTO. THEREFORE, COPYRIGHT OWNERSHIP AND RESALE RIGHTS OFTEN MEAN THE DIFFERENCE BETWEEN BEING ABLE TO STAY OUT THERE PURSUING THE SEARCH FOR SELF EXPRESSION AND HAVING TO ABANDON THE INDIVIDUAL STRUGGLE FOR LITERARY AND ARTISTIC EXPRESSION. I AM HOPEFUL THAT THESE HEARINGS WILL MARK THE BEGINNING OF A THOROUGH INVESTIGATION INTO WHETHER MANY OF THESE INDIVIDUALS BELIEVE THEY ARE UNDER PRESSURE TO SIGN WORK-FOR-HIRE CONTRACTS IN ORDER TO ACHIEVE THE DIFFICULT GOAL OF PUBLICATION. IF THIS IS TRULY A PROBLEM, WE SHOULD DETERMINE HOW WE CAN BEST REMEDY THE SITUATION.

WE MUST BE EXTREMELY CAREFUL IN WEIGHING THE RIGHTS OF WRITERS, CREATORS, AND PUBLISHERS IN THIS AREA. I AM CERTAIN THAT THE SUBCOMMITTEE WILL TACKLE THE QUESTION OF WHETHER FURTHER LIMITING THE WORK-FOR-HIRE DEFINITION MIGHT RESULT IN THE PUBLISHERS' USING IN-HOUSE STAFF MORE FREQUENTLY TO THE DISADVANTAGE OF INDIVIDUAL AND INDEPENDENT CREATORS.

I THANK SENATORS COCHRAN AND MATHIAS FOR HAVING THE FORESIGHT TO RECOGNIZE THE PROBLEMS INVOLVED AND THE PERSISTENCE TO FOLLOW THROUGH WITH THESE HEARINGS. WE ARE BLESSED TO LIVE IN A SOCIETY WHERE CREATIVE EXPRESSION IS A GUARANTEED RIGHT. FOR A RIGHT TO BE TRULY VESTED, IT MUST BE ADEQUATELY PROTECTED. THIS IS THE QUESTION WE ARE PURSUING TODAY IN THESE HEARINGS AND IN OUR FUTURE EXAMINATION OF THIS ISSUE DURING THE REMAINDER OF THE 97TH CONGRESS IN RELATION TO THE INDEPENDENT CREATOR.



CARTOONISTS GUILD, INC. • 156 WEST 72ND STREET, NEW YORK 10023 • (212) 873-4623

August 12, 1982

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D. K. Holland
Executive Vice President
Graphic Artists Guild
30 East 20th Street
New York, NY 10003

Dear Debbie:

As you know, the Cartoonists Guild has been strongly opposed to the work-for-hire provision of the copyright law from 1978 on and helped to initiate the Ad Hoc Committee To Preserve Creators Rights, the first coalition of arts organizations formed to lobby against work-for-hire and educate freelance creators about the insidious dangers of their agreeing to such contracts.

In this context, we see it as a major victory that hearings have been granted on work-for-hire in front of the U.S. Senate in late August. It is indeed a wonderful opportunity to dramatize both the basic inequity of W4H and the pressing need for the clause to be deleted entirely from the copyright law.

The Cartoonists Guild, of course, endorses and supports the position of the Graphic Artists Guild on W4H and at the Senate hearings. Specifically, this means that our 250 freelance cartoonist members living and working in more than 30 states across the country are absolutely opposed to W4H and will do everything in our power to convince members of Congress to eliminate the work-for-hire loophole from the copyright law.

Unfortunately, however, there is not sufficient time for the CG to gather written testimony from cartoonists who have lost income, self-esteem and/or artwork because of signing a W4H contract -- even though we can confirm to you that this has been the case in our field.

Since August is traditionally a vacation period for our members, we will also not be able to send a representative to the Senate hearings.

Notwithstanding this, we would most appreciate your passing along a copy of this letter to Senator Mathias, who will be chairing the hearings, with any explanatory comments you care to make to underline the depth of our feeling on this issue. There is no question in our minds that until the work-for-hire loophole is firmly and fully closed all creative artists will face a major contradiction of the spirit and intent of the 1978 copyright law to protect -- not impinge -- our rights.

Please keep us informed of what happens at the hearings and how we can continue to work with you and all the other arts groups that share our common concern.

Best regards,

Ron Wolin
Executive Director

RW/jz

jim norland

1751
so. newport way
denver, colorado
80224

303/758-0310

Sept. 21, 1982

Senator Charles McC. Mathias
c/o Senate Subcommittee on Criminal Law
Russell Office Building, Rm. 162
Washington, DC 20510

Dear Senator Mathias:

I know that Senate hearings are to be held soon, around Oct. 1, on proposed amendments to the Copyright law that would restrict applications of "work-for-hire" agreements, which have been widely misused by publishers.

As a freelance writer and photographer, my research and creativity are my chief assets. When these "work-for-hire" agreements are imposed by publishers--which thwarts the intent of the 1976 Copyright law--those assets are denied me, at least in their full use and benefit. I have had to turn down repeat sales of my writing and photography, and thus income, because of "work-for-hire" agreements imposed as a condition of sale by publishers.

A typical "work-for-hire" agreement is arranged to give the publisher all of the benefits and none of the responsibilities of having a writer or photographer fully in his employ, as was an agreement proffered to me by FLOOR COVERING WEEKLY earlier this year. And the writer or photographer or other creative person is effectively prevented from re-selling his or her work, although the Copyright law was designed to give the author or originator full protection of such creations from the moment they became fixed in any tangible form.

Under terms of the FLOOR COVERING WEEKLY agreement, I would have been unable ever to sell reprints of any photos I first sold to that publication; I would have been unable ever to sell second rights (even if clearly stated and offered as such) to other publications, whether or not they competed with the original purchaser.

I had to resign as regional correspondent of the publication, since I could not agree to those terms in good faith, and thus forego an annual income of well over \$1,000, often far higher. I understand that similar agreements were imposed on all who wished to continue writing for other business publications of the Hearst organization.

By contrast, I write for several other specialized business publications, often sharing and adapting ideas and re-selling photos and text (with or without modification to fit interests of the audience), and can do so because of the protection of the Copyright law and the absence of "work-for-hire" agreements. Thus, I can share ideas and information more widely with those who need this information, and yet do so for compensation which is affordable to publications and fair to me as the originator.

I hope that you and your fellow Senators will stop the "work-for-hire" abuses through enactment of restrictions on this practice. These agreements should only apply to bonafide employer-employee relationships wherein the publisher or other purchaser fully bears the costs and responsibilities of that arrangement. To do otherwise is to discourage and penalize writers and other creative persons, and diminish the incentive to produce quality writing and other creative work in this country.

My personal loss directly traceable to the misuse of the "work-for-hire" provisions has been minimal thus far, and the work I resigned was a small part of my overall writing activity. But the threat is real, not just to me but to thousands of writers, photographers and other creative persons. We can't afford to create on a "one sale only" policy.

Thank you.

Sincerely,

Jim Norland

SAN FRANCISCO SOCIETY OF ILLUSTRATORS

1537 Franklin Street

Suite 110 San Francisco 94109

(415) 441-6102

September 23, 1982

From: John A Lytle
President, S.F. Society of Illustrators

ATTN: Marty Kobren
The Criminal Law Subcommittee
Russell Office Building, Rm. 162

Dear Sir,

As President of the San Francisco Society of Illustrators, I am writing to express our opposition to the abusive use of work-for-hire contracts between art buyers and free-lance artists. It is our opinion that the work-for-hire clause is an unfair loophole in the 1978 Copyright Law. This clause was originally intended for specific instances wherein the artist is a contributor to a copyrighted work ie: artists working for or with Walt Disney Studios. With increasing frequency this clause is being applied to general free-lance commissions; thereby contradicting the intent of the (1978) Copyright Law often referred to as the "Creators Law".

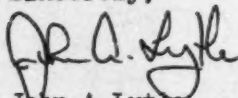
In working under a work-for-hire contract the artist relinquishes any and all rights to the commissioned work. Legally, the artbuyer assumes the role of "creator", the artist then ceasing to exist. A work-for-hire contract leaves the door open for obvious usage abuses. A major factor in determining a fair price for a piece of artwork is the extent of it's use ie: local or national distribution, editorial or advertising market, re-run or reprinting of the book / ad, and intended size (importance).

Under such a contract an artist can, and has, found that a piece originally commissioned (and priced) as a minor work has been extensively used as a major visual ie: book cover, billboard. It's use may also been extended to an accompanying marketing and advertising campaign. Though the value of the artwork to the project has dramatically increased, the artbuyer is under no obligation to pay any additional money to the artist. Increasingly we are seeing that the artist is being penalized for doing work beyond the expectations of the artbuyer.

The work-for-hire contract is most predominant in the publishing industry. Characteristically this industry pays considerably less for artwork than advertising with it's higher money return. What isn't understandable is the demands, without negotiation, insisted upon by many of the major publishers. For many illustrators, signing a work-for-hire contract is mandatory to receive work from a publisher. In doing so the publisher receives the whole package of rights and control for an already low price. Illustrators have long enjoyed the less restrictive expression that publishing assignmentsoffer, but more and more artists are being forced to seek work elsewhere because of the work-for-hire demands.

What the artists are asking for is the right to negotiate; to be paid in accordance with the use of the art. A work-for-hire contract is completely one-sided, needlessly instituted by an increasing number of art buyers. Most often the artists working under such a clause are doing so for survival in an already depressed economy. We are asking for a closer look at the work-for-hire clause, and a clear, fair definition of it's application.

Sincerely,

A handwritten signature in dark ink, appearing to read "John A. Lytle". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John A Lytle
President, S.F.Society of Illustrators

Illustrator 1537 Franklin St N0104
San Francisco 94109 (415) 885 2611
ROBERT GANTT STEELE

16 SEPT. 1982

WORK FOR HIRE STORIES

VOL I.

I. I COMPLETED 6 ILLUSTRATIONS FOR HARDCOURT
BRACE (SF) IN JULY 1981. IN DEC '81 ONE OF
THE 6 WAS SELECTED FOR SOC. OF ILLUSTRATORS ANNUAL 23
IT WAS EXHIBITED IN NY UNTIL MAR '82 WHEN
MY REP IN N.Y. (KIRCHOFF/MONLBERG) REQUESTED
THAT THEY DISPLAY THE PIECES IN THEIR OFFICES.

IN MAY THE CREATIVE DIRECTOR, JUAN COULTON
CALLED SAYING SHE WANTED TO "MORGUE" THE
PIECE AND COULD SHE HAVE IT BACK. MY REP. HAD
TO WORK OUT A DEAL TO "BORROW" THE PIECE FOR
A YEAR. I DID SIGN W4H WHEN I GOT THE JOB.
I EXPRESSED DISAPPROVAL OF THEIR ATTITUDE (#BJ6)
BUT IN THE END WAS POWERLESS TO DO ANYTHING.

II. IN APRIL '82 I COMPLETED A JOB FOR HOUGHTON
MIFFLIN (BOSTON). GOT JOB THROUGH MY REP IN N.Y.
FINISHED BUT DIDN'T SIGN & RETURN THEIR
SEPARATE FROM P.O. W4H FORMS. I GOT PAID
ANYWAY. THEY SENT ANOTHER JOB IN EARLY SEPT.
AND THIS TIME I CALLED AND SAID I WOULDN'T SIGN
W4H, BUT THIS WAS A SYMBOLIC PROTEST - I OBJECTED
TO THEIR ARROGANCE BUT REALIZED I HAD NO
RECOURSE. THE ART DIRECTOR ARCHLY INFORMED

16 SEPT '82

Illustrator 1537 Franklin St No 104
 San Francisco 94109 (415) 885 2611
 ROBERT GANTT STEELE

ME THAT NO SIGN- NO WORK WAS THEIR RULE.
 I HAVE NOT ACTED AS YET ON THIS. I WILL EITHER
 SEND THE JOB BACK UNCOMPLETED OR SEND IT
 BACK WITH THE W/H UNSIGNED, DELETED, OR
 SUBSTITUTED WITH MY OWN CONTRACT.

III. ABOUT 20-25% OF THE \$ VOLUME OF MY
 WORK IS THROUGH MY N.Y. REP. MOST OF THEIR
 CLIENTS ASK WORK FOR HIRE AND ALL THEY
 REALLY CONCENTRATE ON IS PUBLISHING. I AM
 LOSING INTEREST FAST IN THIS MARKET BUT REALIZE
 I HAVE TO BITE THE BULLET TILL I BREAK WITH
 KIRCHOFF WOHLBERG. THEY KNOW OF CASE II ABOVE
 AND APPROVE MY VERBAL OBJECTIONS HOPING THEREBY
 TO PUT PRESSURE ON THEIR CLIENTS.

Artists in Print

Fort Mason Center
San Francisco, CA 94123
(415) 673 6941



September 23, 1982

Attn: Marty Kobren
Criminal Law Sub-Committee
Room 162
Russell Office Building
Washington, DC 20510

RE: WORK FOR HIRE SENATE BILL

Artists in Print is a non-profit membership organization for graphic artists. We are strongly opposed to the work for hire laws currently in practice.

Our organization, based in the Bay Area, serves over 1200 graphic artists throughout Northern California. A majority of our members are free lance artists, directly affected by the work for hire laws. These unfair laws put middle income artists in a financial and ethical bind. It is often hard, in such a competitive field, for the artist to turn down a paying job. However, accepting work for hire they are continually abused. For example:

- 1) Artists working usually on a low hourly rate have no control over publication of their work.
- 2) Publishers may reproduce the work without giving recognition to the artist.
- 3) Publishers may develop a large market profit that the artist does not share in.
- 4) There are no employee benefits available to the artist.

With these conditions in practice, artists can enormously benefit their employers without recognition and only menial financial benefits.

In conjunction with the Graphic Artists Guild of New York and our own membership, we urge you to put a stop to these practices. We ask you to give the individual artists their rightful professional dignity and basic contractual control of their own work.

Sincerely,

Elsa Marley
Executive Director

cc: Debbie Holland

EM:jec

naa
NEWSLETTER
ASSOCIATION OF
AMERICA

Suite 603
 Colorado Building
 1341 G St NW,
 Washington, DC 20005
 202-347-5220

STATEMENT OF THE
 NEWSLETTER ASSOCIATION OF AMERICA
 BEFORE THE
 SENATE COMMITTEE ON THE JUDICIARY

ON

S. 2044

October 12, 1982

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The Newsletter Association of America (NAA) is an international non-profit trade association devoted to the interests of publishers of newsletters and specialized information services. NAA membership currently includes over 700 publishers who produce, collectively, nearly 2000 newsletters in the U.S., Canada and 15 additional countries.

NAA would like to take this opportunity to express our opposition to S. 2044. We believe the apparent intent of this legislation, to provide a "balancing" of interest of authors and publishers with regard to copyright ownership, has been satisfactory taken care of by the 1976 Copyright Act which carefully restricts the categories of commissioned works which may be treated as those "made-for-hire" and further provides that in these circumstances such arrangements are only permissible with the written permission of the author.

Newsletter publishers, with a handful of exceptions, are small businesses by any definition. They do, on occasion, make use of non-staff editorial resources as "stringers" or "contract editors" on a "works-for-hire" basis. NAA submits

that the presumed disproportionality of resources between author and publisher exists much less among newsletter publishers than among other types of publishers.

"Collective works," if newsletters are to be so defined, are created at the instance and considerable financial risk of their publishers. They represent a substantial investment of skill and capital resources in both merging the individual contributions into a current and accurate work and in creating and maintaining a commercial market for that work.

NAA fears the proposed amendment would impair their ability to function and, in fact, reduce rather than expand the potential outlets available for author's work.

SUBMITTED BY:

Newsletter Association of America


Frederick D. Goss
Executive Director

Houghton Mifflin Company



One Beacon Street, Boston, Massachusetts 02108
(617) 725-5000 Cable HOUGHTON

October 14, 1982

The Honorable Charles McC. Mathias
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

Houghton Mifflin Company is a publicly held, diversified publisher of adult and children's fiction and non-fiction, of dictionaries and other reference materials, and of textbooks and other instructional materials for elementary and secondary schools at all levels and for college and university students. In 1981 our corporate net sales were \$185,693,000, and 83% of that came from the educational market. We are vitally concerned about any proposed legislation which might affect our efforts to publish effective and responsive instructional materials for the nation's classrooms.

Specifically, I am deeply concerned over S. 2044, a proposed amendment to the 1976 Copyright Act (P.L. 94-553). This amendment, proposed by Senator Thad Cochran of Mississippi, would amend the definition of "works made for hire" in Section 101 of the Law by striking out certain categories of works of authorship listed in Clause 2. One such category is a work prepared "as an instructional text." By eliminating the possibility that an instructional text could be created on a work made for hire basis, S. 2044 would seriously hamper our publishing programs and, I suspect, the programs of many other publishing companies.

We are not aware that anyone has advanced any significant evidence of abuse of work for hire agreements by publishers of instructional texts. It should also be pointed out that such agreements are not forced on an author since the Law clearly states that a commissioned instructional text can only be subject to a work for hire agreement "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." (Emphasis added.) The removal of this category of works from eligibility for work for hire agreements is simply not warranted. Certainly, the years of debate and searching analysis that resulted in the compromise provisions of the present law should not be set aside lightly.

The practice of entering into work for hire agreements is common for instructional texts because of sound business principles. Without this form of agreement available to us as an "option" to be used when appropriate, I estimate that our overall costs of publishing would be substantially higher over a period of years. This cost would not be in terms of the prices paid for new contributions, which would remain subject to negotiation as always, but in terms of revising and adapting successful programs in response to the shifting demands of the educational community. Let me give you the specific justification for this statement by outlining the chronological history of a program of instruction for the elementary school levels, Grades 1 through 8 as it would be conceived of, developed, and eventually published by Houghton Mifflin.

The author-publisher relationship in the preparation of such a program differs greatly from that which exists in the preparation of a work for the general reading public. When the work is prepared at the "instance, direction, and risk of the publisher" (see the Register's Report of 1965) there are many practical reasons for having the copyright ownership of contributions to instructional texts vest in the publisher.

1. In early 1980 Houghton Mifflin purchased the services of an independent market research company to determine the size of a subject area at the elementary school level for which we had no published instructional program.

The research showed that over 85% of the pupils in the public and private schools were enrolled in classes in the area and, furthermore, that there was a need for a new approach. Teachers were not satisfied with the programs available to them. Following an analysis of the nature of the materials needed, we made a corporate decision to invest in the development of a program to meet that need.

2. During a national meeting of a professional association of teachers we invited a group of educators from all over the country to gather together to discuss trends and needs in the subject area in general, and our proposed approach in particular. We paid an honorarium to those who attended. Out of this one-day meeting two participants, both active classroom teachers, emerged as leaders with ideas compatible with the directions indicated by our research. We subsequently chose them to be the Series Authors of the proposed new program.

3. Later that summer we organized a two-day symposium of selected teachers, which these two individuals led, for further in-depth discussion of methods for achieving our objectives. We paid the travel expenses and an honorarium to all participants, and from this group a preliminary author team was chosen. We prepared letters of agreement requesting the submission of sample exercises or lessons, recommendations for teacher edition materials, proposed tables of contents, etc., in order to learn more about the writing abilities of the proposed contributors and their capacities to comprehend the direction we wanted the program to take. Understandably these agreements for sample or "on approval" materials were work for hire agreements.

4. In the spring of 1981 we sent preliminary letters of agreement to those teachers whose submissions satisfied our criteria for subject knowledge and writing ability. These letters confirmed our mutual understanding that we proposed to publish a new program of instructional materials and that we hoped to retain them as authors on a royalty basis as soon as their individual assignments could be determined.

5. In the fall of 1981, after further study and discussion, we determined the specific assignments of these authors, prepared publishing agreements, and paid advances against future royalties to be earned under the terms of the agreements. The two Series Authors with responsibilities for overall editorial advice received contracts with language appropriate to their broad range of assignments. Fourteen other authors, whose responsibilities were for specified books in the program, also received royalty contracts but these were work for hire agreements. A typical assignment in such an agreement is "To assist the Publisher in the preparation for the Program of Level Six, Student Textbook and Teacher's Edition in book form..." In this program, as with others, we and the fourteen authors agreed that the work for hire concept with a royalty arrangement was realistic and appropriate.

6. Finally, 148 individual work for hire letters of agreement were signed with teachers and independent contractors for assigned text contributions to the program. An additional 125 work for hire contracts were agreed to by freelance illustrators, all of whom were given very specific commissions to prepare and deliver original illustrations to accompany the text. All such agreements specified payment of fees upon satisfactory completion of assignments and our acceptance of their work.

This approach to developing and publishing a new program has worked for these materials as it has for many previous programs. The first of the new books are just now being delivered to our warehouse, nearly three years from the initial discussions and after the investment of several millions of dollars. Why do we insist on work for hire agreements with the many contributors to an instructional text program? There are several widely accepted and logical reasons:

a. We must have the freedom to manage all elements in a program of instructional materials in which we have made heavy investments. During the 3 to 4 year period of preparing the program for publication it often happens that different needs are uncovered and the publisher, who is bearing the risk, must be able to adjust by revising the manuscript before publication. It should be pointed out that when such changes are required, the terms of a work for hire agreement with a contributor is honored. We do not pay on publication but on "acceptance of satisfactory work."

b. It will often be difficult to look at an instructional unit in a published text and recognize the original contribution on which it is based. Often the only element that will be kept will be the author's idea of how a prescribed concept should be taught. Submissions are edited for levels of readability and appropriateness of subject matter, to avoid the portrayal of stereotypes, to achieve a balance between male/female roles as well as ethnic and other groups, and to make sure that the unit fits into the sequential flow of the learning objectives of the complete program of instruction. These criteria, which are considered essential by our customers in school systems, are beyond the scope of any one contributor's responsibility. We must have the freedom to revise original submissions in order to satisfy them.

c. A successful instructional text, unlike most other kinds of literary works, must be revised every three to five years in response to the needs of our customers and to meet the competition. It may also have to be adapted to fit a different medium in order to take advantage of new technologies. Consequently, we can't afford to limit our thinking to publishing in "textbook" form only, nor can we enter into agreements with contributors to our programs which restrict us to a single medium. If we did, we would not be able to make the long-range investments in major programs and we would not be acting responsibly on behalf of authors who depend on royalties from the sales of works over a period of years. It would be very costly, if not impossible, to go back to the hundreds of contributors to an instructional program in order to re-negotiate rights for each revision or adaptation. Furthermore, as I explained earlier, it would be virtually impossible to identify the contribution of the individual author in order to form the basis for such negotiations.

d. An author's contribution is an integral part of the whole and would have little or no value to the author upon termination of the agreement in 35 years or sooner. This is due in part to the fact that it is usually completely edited, as pointed out earlier, and, also, because it is written for a specified purpose and place. It is not a free-standing literary work.

e. This is also true for most illustrations specially commissioned for use in the instructional text. These are usually prepared to fit into closely defined limits and it is hard to see how they would be of any financial value in any other form at any time, let alone 35 years later. There are not many instructional programs that are successful enough to continue active and unchanged for 35 years. I can't think of one in which the original illustrations for the first edition would still be appropriate 35 years later. Imagine how old-fashioned the automobiles, clothing, radios, and prices in a text published in 1947 would look today. We wouldn't be able to sell it. If requested to do so by the artist, we would gladly return the rights to artwork in about 10 years or when the edition in which it appears is put out of print. This would certainly be far earlier than the 35 year date. That concern is not applicable to most art created on commission for instructional texts.

f. The fact that illustrations created for texts are commissioned as works made for hire does not restrict the artists' freedom to show them in their portfolios as examples of work. Tearsheets of finished work are used for this purpose. However, we must own the original art, and the reproduction rights to it, for as long as we are using it in active texts for two very real reasons: (1) when we revise a current edition, we often

need the original art in order to prepare new plates for printing, (2) textbook publishing is a highly competitive field and the art program in a text is a competitive feature. Obviously we can't permit distinctive art that we commissioned to be available to our competitors or diluted by broad general use.

The work for hire concept was not new with the 1976 Copyright Act. As others have pointed out, it was developed over the years and the current Law in Section 101, simply defines and narrows a legal concept which has evolved to reflect publishing reality. It stands as a compromise on which the representatives of authors and publishers agreed. It is my understanding that the designation of the nine categories of works eligible for work for hire agreements was at the initiative of authors' representatives.

At Houghton Mifflin we use the work for hire agreement responsibly and when there are good practicable reasons for doing so. The publication of instructional texts is at the publisher's initiative and substantial risk, a fact which we believe makes the logic of the work for hire provision clear. I believe that work for hire agreements play a significant role in the unique process of instructional text publishing, and that this fact warrants removing the reference to them from S. 2044. If the amendment should go through as it is now written it would have a deleterious effect on educational publishing programs. I appreciate your interest and attention and trust you will give my concerns your serious consideration. Thank you.

Sincerely,



Charles A. Butts

Director

Corporate Contract and Copyright Administration

CC: Senator Edward M. Kennedy

October 15, 1982

The Honorable
Charles Mathias
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

Harcourt Brace Jovanovich, Inc., appreciates this opportunity to make additional comments in opposition to S. 2044, as introduced by Senator Cochran, to amend the work made for hire provision of the Copyright Act of 1976. We respectfully request that this letter be included in the transcript of the hearings of October 1.

We listened with great care to the positions presented by the author and artist representatives in support of the proposed Cochran amendment, as well as to the representatives of the various publishers. There appeared to be little testimony in support of that section of Senator Cochran's bill which seeks to prevent and prohibit work made for hire agreements with respect to instructional texts. It appeared to us that one of the proponents' major concerns was with that portion of the amendment dealing with periodicals, and that the only type of periodical seriously discussed was the general consumer magazine. As a major publisher of literally hundreds of different periodicals in diverse categories, most of which are not general consumer magazines, we appreciate the opportunity to comment with respect to that issue.

Harcourt Brace Jovanovich, Inc., is among the many publishers - large and small - that publish numerous types of periodicals and collective works. Our periodicals range from highly technical scientific journals, such as Theoretical Population Biology with a world-wide subscription just under 600, to Instructor Magazine which has a readership of 800,000, primarily of elementary school teachers and principals. Some HBJ publications are as contemporary as Computer Graphics and Image Processing, and others like the Pipeline and Gas Journal have been in continuous publication since 1859. Between this range of audiences and ages is an even wider range of practices with respect to editorial policies, reliance on freelance contributors, use of by-lines, use of columnists, solicitation of advice or recommendations from boards of advisors and experts or from committees of scholars and reviewers. Some periodicals may have more than 100 contributors per issue, while some newsletters may be the product of only a few people

The diversity represented by Harcourt Brace Jovanovich's periodical publishing is not unique, nor is the field static. The marriage of traditional print-on-paper publishing with today's rapidly developing computer and communication technologies is giving birth to new and undefined types of works. Current endeavors in data-base and electronic publishing are capable of synthesizing and assembling contributions and information in ways which are custom-tailored to fit user needs and which create information obtainable in no other way. These new electronic "publications" are composed of portions of old and new contributions from countless sources; they are "revised", "edited", and "recompiled" on demand and instantaneously. Clearly it would be impossible for a publisher to renegotiate rights and permissions from each contributor for each use. Furthermore, the reversion of rights to some elements would render the rights to all remaining elements worthless, so inextricably interwoven are the elements of all contributions.

The Copyright Act of 1976, for the very reason that it is prospective, permits that flexibility which is essential to adapt to the needs of the marketplace and the opportunities of technological change.

Despite the almost infinite variety of periodicals, newsletters, directories, and other collective works Harcourt Brace Jovanovich publishes, there is a constant. In all instances Harcourt Brace Jovanovich, as publisher, assumes responsibility for the creation of the concept, for the on-going financial commitment, and for editorial direction of the publication.

The work made for hire section of the Copyright Act of 1976 recognizes this diversity and continues a practice which permits publishers, in those appropriate instances, the latitude to negotiate those terms which are necessary and appropriate. We should point out that work made for hire agreements do not prevent a wide variety of contractual arrangements between publisher and contributor. In fact a wide variety of such arrangements is made and elimination of work made for hire would unnecessarily restrict the flexibility of both publisher and contributor to make these arrangements.

We respectfully urge that the work made for hire section of the Copyright Act of 1976 stand as it exists today.

Respectfully Submitted,

Bella L. Linden
Bella L. Linden

Linden and Deutsch
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New York, New York 10022
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WASHINGTON
INDEPENDENT
WRITERS

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STATEMENT FOR THE UNITED STATES SENATE JUDICIARY COMMITTEE REGARDING "WORK MADE FOR HIRE"

Washington Independent Writers is a tax-exempt trade association and the largest local organization of freelance writers in the United States. WIW presents this statement in support of S.2044. Our 1,400 members in the District of Columbia, Maryland and Virginia encompass the full range of experience and commercial success in writing. We represent part-time freelancers supporting themselves through other salaried employment and full-time freelancers living on the edge of poverty, as well as established independents contractors with regular clients and best-selling authors commanding substantial book publishing fees.

Spectacular financial success is a relatively rare phenomenon in independent writing, where yearly incomes are likely to average \$5,000 or less. Publishers, however, cite the successes of the few to justify their demands that developing and mid-level writers give up all rights to their works under work for hire. Publishers argue that writers should welcome

the broad exposure that work for hire provides. A writer soon discovers, however, that while the publisher benefits from the sale of subsidiary rights, "exposure" does not pay the writer's bills.

Our cultural history is blemished by the way the marketplace has treated men and women of letters. Some of today's most revered literary heroes and heroines went unrecognized and unrewarded during their lifetimes. Yet, today's writers may face a greater crisis. These times of high inflation, recession, and shrinking markets for writing threaten the survival of the independent writer as never before.

In 1977, Daniel Rapoport (now WIW's President) reported in the Washington Journalism Review that some national magazines paid the same fees as they did back in 1870, when Henry James was a freelance writer. The general economic outlook for writers has improved little since 1977. As noted by a Columbia Journalism Review article in the fall of 1981: "Whether they rely on savings, the income of a spouse, or a full- or part-time job, most freelancers cannot get by on what they make."

Too many publishers pay as low as 8 to 10 cents a word for a freelance written article. A 4,000 word feature-length magazine piece, which took four weeks to research, write, and revise, might earn its author \$400 after publication, or \$100 per week. If the commissioned article is not published due to vagaries of the marketplace, a "kill fee" of 25 per cent of the agreed-upon payment, or

a sum equal to a \$25 per week wage, would be this writer's return on a month's work.

Capricious publishing fee schedules and other practices force freelance writers to depend upon the sale of subsidiary rights -- the recycling of a work to additional buyers -- in order to recoup the initial investment of time and resources. In a "work made for hire" situation, however, that opportunity is denied to freelance writers. In demanding work for hire, publishers use their unequal economic bargaining power in the marketplace to extract a blanket assignment of all rights from the work's creator, usually in exchange for the equivalent of an one-time publishing fee.

WIW affirms the concept that each author should have the opportunity to negotiate in separate contracts the resale of every right accruing from a creative work. This organization, therefore, supports S.2044, which Sen. Cochran has introduced, as a means of closing loopholes in the "work made for hire" provision of Sec. 101 of the Copyright Act that perpetuate these publishing abuses. WIW is grateful to the Members of the Committee, especially Sen. Mathias, for the opportunity to present the following specific concerns and experiences of its members regarding "works made for hire."

According to the legislative history of the 1976 Copyright Act, the concept of "work made for hire" was intended to be "a

carefully balanced compromise," ^{1/} a compromise between the presumption that the creator of a work owns the copyright and what the Congress saw as the legitimate interests of employers. However, because of widespread abuses by the publishing industry, the balanced compromise Congress sought does not exist. Congress, therefore, must act to correct these abuses and assure that the rights of a work's creator are protected.

Works Created by an "Employee."

In the case of work created by a true employee, it is arguable that the publisher should own the copyright. In exchange for providing the employee with a salary, fringe benefits, (e.g., sick pay, worker compensation, and paid vacations), a workplace, and supplies; and by actively supervising the employee's day to day activities, the employer can claim ownership rights in the employee's work.

Typically, a publisher provides a freelance writer with none of the traditional benefits of employees. A freelancer provides his or her own workplace, and is paid a flat fee only upon acceptance of a work. The publisher provides no insurance or other benefits; nor does the publisher actively supervise the freelancer during the preparation of the work.

^{1/} H. Rep. No. 94-1476, p. 121; S. Rep. No. 94-473, p. 104.

Despite the clear indication that a freelancer is an independent contractor rather than an employee, WIW knows of a number of instances in which publishers, without any written agreement with the writer, claim that the freelancer is an "employee" for the purposes of the Copyright Act. Therefore, without agreeing in writing to "work for hire," the freelancer is faced with the publisher's claim that it owns the copyright to the freelancer's creation. Because of the time and expense involved in litigating the copyright issue, and the fear of retaliation by the publishing industry, WIW has found that freelancers generally relent rather than fight.

One reason that publishers can make this claim is that the Copyright Act does not define the term "employee." As noted by Melville Nimmer, a leading commentator on copyright law, the courts are neither clear nor consistent in deciding who is an employee and who is not.^{2/} WIW asks that the Committee clarify the Copyright Act by restricting the definition of "employee" to those situations in which the writer both receives the benefits and is under the direct supervision typical of true employee status.

Works Specially Commissioned or Ordered by the
Publisher For Specific Types of Publications

According to both Prof. Nimmer and representatives of the publishing industry, work for hire should apply only to a particular work that is specially commissioned or ordered by the publisher in

^{2/} 1 Nimmer on Copyright Law p. 5-14; see cases cited in footnote 18.

advance of the work's creation.^{3/} Nimmer states that typically a "commission" involves a request by the publisher that the author prepare a specific copyrightable work, with the publisher's request being the "motivating factor" in producing the work.^{4/} The Magazine Publishers Association, in its testimony before this Committee, goes so far as to suggest that "work for hire" applies only to works conceived by the publisher.^{5/}

However, the reality of the publishing world, as experienced by WIW members, is contrary to these lofty notions. For example, some WIW members have been presented "work for hire" agreements, even though they had completed the particular work before they had any contact with the publisher. In other instances, authors were coerced into endorsing checks with "work made for hire" agreements stamped on the back, in order to get payment for work already accepted by the publisher without such an agreement. Other publishers use "work for hire" agreements, even when the idea for the work originated with and was suggested by the author.^{6/}

In none of these instances was the publisher the "motivating force" behind the work; yet in each case, the freelance writer

^{3/} 1 Nimmer on Copyright Law at p. 5-14 ("a work created by an author prior to any relationship with the putative employer could not under any view be regarded as falling within the 'for hire' doctrine").

^{4/} 1 Nimmer on Copyright Law at p. 5-25.

^{5/} Summary of MPA Statement at p. 9.

^{6/} See e.g., Omni Magazine author contract attached to the testimony of the American Society of Journalists and Authors, Inc.

lost all rights to his or her creation. These situations are clear examples of the publishing industry going beyond the intent of Congress in demanding that freelancers agree to work for hire.

Another clear abuse of work for hire is the ongoing work for hire agreement. Generally, these agreements apply not only to the particular work that the author is creating at the time the agreement is signed, but to "all articles written by [the author] and published by [the publisher] in the future." ^{7/} Under these agreements, the magazine is claiming the copyright to all the author's future work that it publishes, even though the publication is commissioning ~~only~~ a single work.

Often, a freelancer will conceive of an idea for a work and query one publisher at a time, with either a proposal or a finished manuscript, until he or she finds a buyer. In this situation, the work was the author's idea: the work was not specifically commissioned or ordered in advance by anyone, and was not "created to fill the needs of a specific employer or a market." ^{8/} Therefore, work for hire clearly should not apply. However, if the writer previously signed an ongoing "work for hire" agreement with a publisher, that publisher likely will claim that it owns the copyright to the work, even though its actions are contrary to the letter and spirit of the law.

^{7/} Signature line of Rolling Stone Magazine contributor's agreement, attached to the testimony of ASJA.

^{8/} Summary of MPA testimony, p. 9

Faced with these apparent attempts to circumvent the law, one might ask why a freelance writer would agree to the various arrangements described in this statement. The answer is clear: unequal economic bargaining power in the marketplace. The nature of the publishing industry is such that all but the most prominent freelancers must agree to relinquish all rights to their work under questionable circumstances, or not see their works in print. Challenging a publisher in court is expensive and time consuming, and many freelancers fear retaliation if they publicly challenge a publisher's actions.

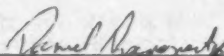
The widespread abuses of "work for hire" require Congress to act to protect the legitimate property interests of freelance writers in their work. Because most freelance writers face "work for hire" in writing for collective works, WIW strongly supports S.2044's deletion of this category from the definition of "work made for hire." If this deletion is made, the presumption contained in Sec. 201(c) of the Act, that the author of each separate contribution to a collective works owns the copyright to that contribution, would apply.

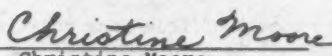
In addition, WIW recommends that the concept of commissioned "work for hire" be clarified, to assure that it applies only to a single work, conceived by the publisher, and specifically ordered by the publisher in advance of any work by the writer.

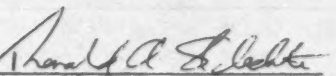
Publishers are the first to boast that the wide use of freelance writers allows them to offer the American reading public a far richer and more diverse cross-section of information and ideas than otherwise would be possible. At the same time, however, they defend the exploitation of freelance writers to fill their own treasuries as the hapless by-product of a free market system.

As today's harsh economic realities force more and more freelance writers to withdraw their talents in favor of more reliable and better paying employment, it is the American public who suffers the greatest loss. The Federal government's record of intervening in the marketplace where raw market power has been abused, especially when society has a greater, identifiable stake in preserving its access to ideas, is longstanding; indeed, these efforts represent some of this country's finest moments. WIW, thus, urges Congress to correct this problem by its immediate passage of S.2044.

SUBMITTED ON BEHALF OF
WASHINGTON INDEPENDENT WRITERS
BY:


Daniel Rapoport
WIW President


Christine Moore
WIW Legislative Committee
Chairman


Ronald A. Schechter
Goldfarb, Singer & Austern
Counsel to WIW



JOINT ETHICS COMMITTEE / POST OFFICE BOX 179 GRAND CENTRAL STATION / NEW YORK, N.Y. 10163

The Joint Ethics Committee is an organization whose members are illustrators, painters, art directors (agency, editorial, corporate and TV), graphic artists, photographers, and the people who represent them in the world of business.

It is an organization that strives for the working artist's and client's right to practice a craft and receive fair compensation. The JEC exists to consider the relations between buyer and producer of art work and to offer its services in any dispute that might arise.

Collectively, JEC members serve as a catalyst to settle disputes between artist and buyer without litigation...with no legal fees, no red tape and no permanently damaged relations between the parties in disagreement.

The Joint Ethics Committee was founded in 1945. A group of New York artists and art directors from the Society of Illustrators, the Art Directors Club of New York and the Artists Guild of New York joined forces to face the ever-growing abuses, misunderstandings and disregard for uniform conduct in the business.

In 1948 the JEC adopted what is called the Code of Fair Practice, which quickly became the guideline for the professional art world. This group has since expanded to include the American Society of Magazine Photographers, The Graphic Artists Guild and the Society of Photographer and Artists Representatives.

In 1978 the Code of Fair Practice was updated to encompass the current needs of the Graphic Communications Industry and the new copyright law. One of the most important items that concerns us is the "work for hire", clause (2). The JEC states, in article 15, that commissioned art work is not to be considered as "Work for Hire".

The concept of freelance creative persons working under a "work for hire" agreement is both unethical and unfair, and in many instances it is abusive. Unlike an employee, freelance persons do not receive regular, continuing pay checks nor do they receive benefits (medical, pension etc.)

AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS, INC.
THE ART DIRECTORS CLUB, INC.
THE GRAPHIC ARTISTS GUILD, INC.
SOCIETY OF ILLUSTRATORS, INC.
SOCIETY OF PHOTOGRAPHER AND ARTIST REPRESENTATIVES, INC.
COUNSEL: PAUL R. POPE (212) RE 2-8844

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Pricing in the Graphic Communications Industry is based primarily on usage. We believe this to be ethical and fair business practice. If a buyer wants to use a visual in newspaper only, to run in just two cities, it is logical that the price for this would be less than than using the same visual in all newspapers across the country. It becomes abusive when the buyer prices the assignment for this limited usage and then states that the assignment agreement must be a "work for hire". In increasing numbers of times this statement is made after the start of an assignment or on a letter mailed, purchase order. As a "work for hire", the buyer is immediately given, without compensation, the right to use this visual in any and every area of advertising and promotion. A further unfairness, as the copyright code now exists, is the pitting of one individual against a large many faceted company or corporation.

The ownership of the original is also a confusion. The original is quite separate from the rights and should be treated separately.

The Joint Ethics Committee supports "specific and defined usage" and realizes the importance of upholding the principle of "payment per usage". We are very aware of increasing incidences regarding "work for hire" in the Graphic Communications Industry and of the injury and harm it is causing in this market.

The Joint Ethics Committee sponsored by the Society of Illustrators, The Art Directors Club, The American Society of Magazine Photographers, the Society of Photographers and Artist Representatives and The Graphic Artists Guild requests that the entire clause (2) definition, Section 101 of Title 17, be stricken.

Respectfully submitted

Joint Ethics Committee

AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS, INC.
THE ART DIRECTORS CLUB, INC.
THE GRAPHIC ARTISTS GUILD, INC.
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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Statement of Phillip Leonian

on

S.2044, To Amend The Definition of
"Works Made For Hire"

My name is Phillip Leonian. I am a free-lance photographer. Although I am an active member of three of the creator organizations submitting testimony on S.2044 to amend the copyright law regarding "works made for hire," this is my own statement. My hope is to supplement rather than echo the information offered by others.

Photography was invented in 1839. From that date to this, only the 1865 copyright law revision which gave statutory copyright to photographs marked the appearance of photographers in force to testify to their needs for copyright protection. There is consequently relatively little in the legislative history directly relating to business practice in my field of authorship. A few notes on the subject may also serve to explain the absence of photographers from participation in the process up till now, and our presence today.

Until the 1976 revision, the federal copyright law was properly, if loosely, referred to as a publisher's law. Until late in the nineteenth century, the only practical way to "publish" a photograph was to make photographic prints from photographic negatives. These prints once made, however, could be re-photographed. The photographer thus acted as his own publisher, but had no protection against unauthorized copying by other photographers. Matthew Brady is said to have "ripped off" the work of other photographers early on, and was in turn ripped off himself. No wonder then that pre-1865 photographers clamored for the protection of the copyright statute.

In the 1880's various forms of mechanical reproduction began to supplement the straight photographic process. Soon after the turn of the century, the half-tone process familiar today was perfected enough to reproduce photographs in the pages of newspapers and magazines. This clearly marked the end of the era of photographer as publisher, and

of photographer reliance on the protection of the federal statute as well.

Up until 1945 most of the photographs reproduced by publishers were done either by staff photographers (regular employees) or obtained from picture agencies and libraries. The Library of Congress is a leading example. That small percentage done by free-lance photographers was probably in large part "work made for hire." Photographers gave little thought to the exact status since for them the possession of the photographic negative represented practical ownership of access to the copyright.

The rest of the short history of business practice in photography has taken place within my own working life. When I came to New York City in the early fifties and established myself as a working photojournalist, I found a business where extremely competent, competitive photographers and equally professional magazine editors worked together with a high degree of trust. Verbal contracts were the rule. A strong respect for trade practice made the wheels go round. Publishers paid modest day-rates and all job-related expenses and in return got our best efforts and one-time reproduction rights. We were given additional incentive to quality by payment of an additional "page rate" if the total of published pages multiplied by this rate exceeded the time-based payment due, and by the possibility of further income from subsequent sales. We could, and did, accept assignments with no immediate profit if the aftermarket potential was high (much like the arrangements between independent television producers and the networks today.)

We photographers were aware of the danger posed to this (to us) equitable arrangement by the presumption in law at that time that a photographer doing specially commissioned work even though as an independent contractor was deemed to do "work for hire" absent agreement to the contrary, so it became common practice to confirm our verbal and trade understandings with editors on the bills we sent for our fees and job-related expenses.

By 1960 the magazine marketplace started to shrink. As a "last-in" I was one of the first out, turning to advertising illustration. I set up my first studio in New York in 1962. I was still in a position, however, to observe the distress caused around 1965 when an editor unilaterally asserted proprietary rights in the black-and-white negatives and color transparency originals of the photographers who did assignments for him.

A dozen of the world's most respected photographers withheld their services. It took three years to arrange an uneasy truce.

The photographers who had grown up in photojournalism went into other fields to replace the work no longer available or amenable with magazines -- notably into advertising and corporate work. We found that compensation was set almost entirely by the contemplated first usage. Except for a few superstars, a tyro (whom the client deemed good enough to be able to execute the assignment) would be paid the same as a photographer of established reputation in any given situation. We brought with us our expectations of limiting the grant of rights to those used in calculation of the creative fees by contract.

The last twenty years have seen a refinement of these arrangements with a number of other factors entering into the calculation of fees, but in almost all cases the reproduction rights to be granted have remained the determining factor for compensation within each photographer's price range.

In the more sophisticated national markets, the incidence of specialization has also increased, so that photographers have come to be identified and distinguished from each other by the use of a number of modifying terms that describe

- 1) employment status: "free-lance (independent contractor); "staff" (regular employee); "contract" (a unique kind of retainer relationship where in return for specified availability to the publisher, a photographer receives some of the advantages of "staff" status, such as a minim guaranteed income, health insurance, equipment allowances while otherwise remaining "free-lance" including in most cases retaining copyright);
- 2) level of fixed overhead: a "studio photographer" is presumed to have a capital investment, higher rent, employee expenses and other overhead; a "location photographer" is presumed to have a lower level of fixed costs to go with his or her greater mobility;
- 3) the type of media or client served: magazine, newspaper, advertising, corporate, passport, etc.

- 4) subject specialty: still life, fashion, architecture, food, beauty, people illustration, portrait... The list is endless. Naming a subject is only the first step to finding a photographer who specializes in it. The narrowest specialty descriptions are associated with the most cosmopolitan marketplaces, where a large number of potential users choose from a large population of photographers. In areas where fewer choices are available, a "free-lance" may have a specialty preference, but normally must be a generalist in order to make a living.

Ultimately the process ends with the identification, by name, of the photographer best equipped and most suitable for a specific assignment, not only by expertise, but for that photographer's unique photographic expression.

Using this lexicon, I can at present be described as a free-lance studio photographer specializing in the photography of motion in time/space modes and in stroboscopic and multiple imagery. My primary market is advertising illustration though over sixty pages of my work has appeared editorially in the last twelve months.

This degree of specialization in a fairly esoteric area means that a very high proportion of my business is with "first time" clients, so I have become acutely aware of the need for and process of establishing clear terms and conditions for specially commissioned work at the outset of a business transaction.

Consequently it is not surprising that I took an early interest (for a photographer) in the impact of the Copyright Act of 1976, and in 1977 found myself in a leadership position in disseminating information to free-lance photographers about the new law and the ways it would affect the business of photography. It turned out to be a relatively easy task, because the law as written so closely paralleled our trade practice at its best. Or, as one photographer said to me at the end of a seminar on copyright, "How come Congress knows our business so well?"

I was much taken during these hearings with Senator Mathias' reference to that classic adage, "To each cow its calf." It has stood the test of ages by virtue of the superiority of the original "author's expression." Somehow "To each author his or her work" does not communicate as well.

The 1976 revision expresses the same thought at greater length in Section 201(a): "Copyright in a work protected under this title vests initially in the author or authors of the work..." Section 201(b) covers the only exception to 201(a) -- works for hire. Section 101 defines "work made for hire" in two mutually exclusive clauses.¹ Clause (1) states that a work made for hire is "a work prepared by an employee within the scope of his or her employment" which is discussed in the House Report along with Section 201(b).²

Clause (2) of Section 101 with which we are concerned in these hearings defines the legal fiction which allows certain categories of specially ordered or commissioned work to be designated "work made for hire." It is the product of compromise. Both legal fiction and compromise are necessary and reasonable tools if law more just and reasonable than that which preceded it is to be written. Unhappily, the usefulness of legal fiction is cold comfort to ordinary citizens attempting to conduct the business of their lives on a rational basis, and compromise is all too often a temporary solution. Such is the case with clause (2).

It has sometimes seemed to me that since January 1st, 1978, when the 1976 act took effect, every user and potential user of photography has pounced on clause (2) as their salvation from the "dire" effects of the new copyright law, whether they are eligible for the exception or not. Rarely is there any attempt to provide or negotiate additional compensation for the additional rights involved.

Less than a year ago, for example, a New York photographer's representative visiting a major Chicago advertising agency found herself closeted with the agency's art buyer who, after carefully closing the door, whispered, "Now tell me -- what is this New York plot called copyright?"

I have even found the phrase "work made for hire" in a trade secrecy agreement which a photographer was required to sign by IBM

¹ Plus a third, "Work of the United States Government" which incorporates the definition of "work made for hire" by reference in House Report 94-1476, p.58

² Ibid. p.121

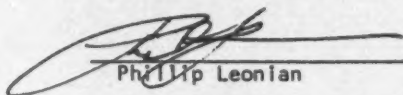
before receiving an assignment to do publicity photos. Obviously, disseminating information about copyright to clients is a much more difficult and challenging project than it has been to photographers.

"Work made for hire" has become an issue charged with emotion on both sides of the table. On the one hand, it does not seem fair and reasonable to creators that someone other than the actual author can be designated the legal author of an independent work. On the other, clients feel that they have "lost" something under the new law which, in many cases, they had never been aware they'd had. Both sides feel their rights are being "taken." In this atmosphere of mutual moral indignation, reasonable negotiation becomes almost impossible.

Clause (2) of Section 101 is working against the best interests of the author, the publisher and the public. The young, who are most vulnerable to its routine application in its most onerous form -- the open-ended agreement, have their future prospects dimmed. Working professionals, denied the aftermarkets, must find other sources of continuing income to cushion themselves against dry periods. The acquisition of unlimited rights by those who commission work provides them with a store of material which can be used at will without additional payment, and reduces the opportunity for future employment not only for the photographer or other creator who signs a "work for hire" agreement, but for all photographers and creators. Reduction of demand inevitably reduces the pool of talent available to publishers. This results in a thinning of the texture and richness of the nation's publications, and the impoverishment of our culture.

It is heartening to observe this Committee's continued pursuit of the Constitutional mandate "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." I look forward to further hearings on this important subject.

Respectfully submitted,


Philip Leonian

October 1, 1982

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